CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, and Notices

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 OCTOBER 19, 1994 NO. 42

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 101

(T.D. 94–77)

CUSTOMS SERVICE FIELD ORGANIZATION; EXTENSION OF PORT LIMITS OF MORGAN CITY, LOUISIANA

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations pertaining to the field organization of Customs by extending the geographical limits of the port of entry of Morgan City, Louisiana. The current boundaries are being extended to include Lafayette Parish. This change is being made in order to include Lafayette Regional Airport and to complement current international trade activities at the Morgan City port of entry. This change will enable Customs to obtain more efficient use of its personnel, facilities, and resources and to provide better service to carriers, importers, and the general public.

EFFECTIVE DATE: November 4, 1994.

FOR FURTHER INFORMATION CONTACT: Brad Lund, Office of Inspection and Control, (202) 927–0192.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of its continuing program to obtain more efficient use of its personnel, facilities and resources, and to provide better service to carriers, importers and the public, Customs is amending § 101.3, Customs Regulations (19 CFR 101.3), to expand the boundaries of the port of Morgan City, Louisiana. The expansion of the port will add Lafayette Parish to the existing limits which are the parishes of Iberia, Lafourche, St. Mary, and Terrebonne, the corporate limits of the town of Grand Isle, and that portion of the right-of-way pertaining to State Highway 1 extending in a northeasterly direction from the Lafourche Parish and Jefferson Parish boundary line to the corporate limits of the town of Grand Isle.

The addition of Lafayette Parish, including Lafayette Regional Airport, will complement the current international trade activities in the parishes of Iberia, Lafourche, St. Mary and Terrebonne and the town of Grand Isle. Lafayette Parish's inclusion in the international port of entry will provide a boost to the economy of southern Louisiana. It will reduce the operating costs of recipients of Customs services, thereby greatly improving prospects for international trade.

COMMENTS

Customs published a Notice of Proposed Rulemaking in the Federal Register (59 FR 23817) on May 9, 1994 which invited the public to comment on this proposed change to the port limits.

Nine comments were received. All of them were in favor of the proposed expansion. Accordingly, the amendment is being published in final as it was proposed.

REVISED PORT LIMITS

The revised port limits are as follows:

> In the State of Louisiana: All of the territory within the Parishes of Iberia, Lafayette, Lafourche, St. Mary, and Terrebonne; the Corporate limits of the town of Grand Isle; and that portion of the right-of-way pertaining to State Highway 1 extending in a northeasterly direction from the Lafourche Parish and Jefferson Parish boundary line to the corporate limits of the town of Grand Isle.

REGULATORY FLEXIBILITY ACT

Although Customs solicited public comments on this port expansion, no notice of proposed rulemaking was required because the port expansion relates to agency management and organization. Accordingly, this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies).

AMENDMENT TO THE REGULATIONS

Accordingly, Part 101 of the Customs Regulations is amended as set forth below:

PART 101—GENERAL PROVISIONS

1. The general authority citation for Part 101 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 2, 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States), 1623, 1624.

2. The list of Customs regions, districts and ports of entry in § 101.3(b) is amended by removing the reference "T.D. 93–30" and adding in its place "T.D. 94–77", alongside "Morgan City" in the column headed "Ports of entry" in the New Orleans, Louisiana District of the South Central Region.

CHARLES W. WINWOOD,
Acting Commissioner of Customs.

Approved: September 26, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 5, 1994 (59 FR 50689)]

(T.D. 94–78)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: OCTOBER 1 THROUGH DECEMBER 31, 1994

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.740600
Austria	Schilling	0.091392
Belgium	Franc	0.031260
Brazil	Cruzado	N/A
Canada	Dollar	0.743108
China, P.R.	Renminbi yuan	0.116959
Denmark	Krone	0.164231
Finland	Markka	0.206569
France	Franc	0.188537
Germany	Deutsche mark	0.643211
Hong Kong	Dollar	0.129408
India	Rupee	0.031878
Iran	Rial	N/A
Ireland	Pound	1.560000
Italy	Lira	0.000639
Japan	Yen	0.010050
Malaysia	Dollar	0.389560
Mexico	Peso	0.294291
Netherlands	Guilder	0.574350
New Zealand	Dollar	0.602700
Norway	Krone	0.147417
Philippines	Peso	N/A
Portugal	Escudo	0.006316
Singapore	Dollar	0.674309
South Africa, Republic of	Rand	0.279018
Spain	Peseta	0.007772
Sri Lanka	Rupee	0.020292
Sweden	Krona	0.133726
Switzerland	Franc	0.773395
Thailand	Baht (tical)	0.039968
United Kingdom	Pound	1.578500
Venezuela	Bolivar	N/A

Dated: October 3, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 94–79)

FOREIGN CURRENCIES

Daily Rates for Countries not on Quarterly List for September 1994

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: Monday, September 5, 1994.

Greece drachma:

September 1, 1994	$0.004181
September 2, 1994	.004226
September 6, 1994	.004254
September 7, 1994	.004241
September 8, 1994	.004212
September 9, 1994	.004265
September 12, 1994	.004259
September 13, 1994	.004240
September 14, 1994	.004264
September 15, 1994	.004238
September 16, 1994	.004278
September 19, 1994	.004228
September 20, 1994	.004225
September 21, 1994	.004276
September 22, 1994	.004242
September 23, 1994	.004248
September 26, 1994	.004216
September 27, 1994	.004235
September 28, 1994	.004234
September 29, 1994	.004237
September 30, 1994	.004227

South Korea won:

September 1, 1994	$0.001245
September 2, 1994	.001244
September 6, 1994	.001243
September 7, 1994	.001243
September 8, 1994	.001243
September 9, 1994	.001243
September 12, 1994	.001244
September 13, 1994	.001244
September 15, 1994	.001245
September 16, 1994	.001245
September 19, 1994	.001246
September 20, 1994	.001246
September 21, 1994	.001246
September 22, 1994	.001246
September 23, 1994	.001244
September 26, 1994	.001241
September 27, 1994	.001241
September 29, 1994	.001247
September 30, 1994	.001247

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for September 1994 (continued):

Taiwan N.T. dollar:

September 1, 1994	$0.038105
September 2, 1994	.038110
September 6, 1994	.038153
September 7, 1994	.038153
September 8, 1994	.038168
September 9, 1994	.038168
September 12, 1994	.038153
September 13, 1994	.038153
September 14, 1994	.038168
September 15, 1994	.038153
September 16, 1994	.038139
September 19, 1994	.038124
September 20, 1994	.038124
September 21, 1994	.038110
September 22, 1994	.038183
September 23, 1994	.038183
September 26, 1994	.038226
September 27, 1994	.038139
September 28, 1994	.038139
September 29, 1994	.038212
September 30, 1994	.038168

Dated: October 3, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 94–80)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR SEPTEMBER 1994

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 94–56 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday: Monday, September 5, 1994.

Finland markka:

September 6, 1994	$0.198551
September 7, 1994	.198255
September 9, 1994	.199820
September 12, 1994	.201471
September 13, 1994	.200260
September 14, 1994	.200884
September 15, 1994	.200361
September 16, 1994	.202799
September 19, 1994	.202020
September 20, 1994	.201796
September 21, 1994	.202840
September 22, 1994	.202799
September 23, 1994	.203211
September 26, 1994	.203190
September 27, 1994	.203853
September 28, 1994	.203915
September 29, 1994	.204645
September 30, 1994	.204918

Sweden krona:

September 16, 1994	$0.134900

Dated: October 3, 1994.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, October 3, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF PLASTIC DRAWING BOARDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a plastic drawing board. Notice of the proposed modification was published August 24, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 34.

EFFECTIVE DATE: This decision is effective for merchandise entered, or withdrawn from warehouse, for consumption on or after December 19, 1994.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 24, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 34, proposing to modify New York Ruling

Letter (NYRL) 862264, issued April 22, 1991, by the Area Director of Customs, New York Seaport, wherein an article identified as a "magic drawing board" was classified in subheading 9610.00.00, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received concerning the matter.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying NYRL 862264. Accordingly, Customs is issuing a ruling letter to reflect proper classification of the merchandise in subheading 9503.90.60, HTSUS, which provides for "Other toys * * * and accessories thereof: Other: Other: Other toys (except models), not having a spring mechanism." The ruling modifying NYRL 862264 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 29, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 29, 1994.

CLA–2 CO:R:C:F 956778 GGD
Category: Classification
Tariff No. 9503.90.60

MS. LORIANNE ALDINGER
RITE AID CORPORATION
P.O. Box 3165
Harrisburg, PA 17105

Re: Modification of New York Ruling Letter (NYRL) 862264; "Magic Drawing Board;" not board with writing or drawing surface.

DEAR MS. ALDINGER:

In NYRL 862264, issued April 22, 1991, an article identified as a "magic drawing board," was classified in subheading 9610.00.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Slates and boards, with writing or drawing surfaces, whether or not framed." We have reviewed that ruling and have found it to be partially in error. The correct classification is as follows.

Facts:

The article at issue consists of a plastic drawing board with a luminous surface, and a specially-shaped, plastic "pen." An impression is left when the "pen" is pressed and moved

upon the surface. When the luminous surface flap is lifted, any writing or drawing disappears, rendering the surface clear for repeat usage. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 862264 was published on August 24, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 34.

Issue:

Whether the article is properly classified as a board with a writing surface in subheading 9610.00.00, HTSUS, or as an other toy in subheading 9503.90.60, HTSUS.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

Heading 9610, HTSUS, provides for "Slates and boards, with writing or drawing surfaces, whether or not framed." Note 1(1) to Chapter 96 states that the chapter does not cover articles of Chapter 95 (toys, games, sports equipment). The ENs to heading 9610 indicate that the heading covers slates and boards, clearly designed to be used for writing or drawing with slate pencils, chalks, felt or fibre tipped markers (e.g., school children's slates, blackboards and certain notice boards). We note that each writing or drawing instrument mentioned for use on boards of heading 9610 leaves its own mark, unlike the subject plastic "pen" which, through pressure, causes the underlying **surface** to make the mark. Thus, the "magic drawing board" is not **clearly** designed for the uses of articles classifiable in heading 9610.

Heading 9503, HTSUS, applies to "other toys," i.e., all toys not specifically provided for in the other headings of chapter 95. Although the term "toy" is not defined in the tariff, the ENs to chapter 95 indicate that a toy is an article designed for the amusement of children or adults. The "magic drawing board" is designed to provide amusing activity involving writing, drawing, and erasing. The ENs to heading 9503 state that the heading includes certain toys that may be capable of a limited "use," but that the heading excludes slates and blackboards of heading 9610. Since the "magic drawing board" provides amusement, but is of limited use when compared to articles clearly designed to function as writing surfaces, we find that the article is properly classified as a toy.

Holding:

The "magic drawing board" is classified in subheading 9503.90.60, HTSUS, the provision for "Other toys * * * and accessories thereof: Other: Other: Other toys (except models), not having a spring mechanism." The applicable duty rate is 6.8 percent *ad valorem*.

NYRL 862264, dated April 22, 1991, is hereby modified.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF MAGNETIC DRAWING BOARDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of a magnetic drawing board. Notice of the proposed modification was published August 24, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 34.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse, for consumption on or after December 19, 1994.

FOR FURTHER INFORMATION CONTACT: Greg Deutsch, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 24, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 34, proposing to modify New York Ruling Letter (NYRL) 873634, issued May 4, 1992, by the Area Director of Customs, New York Seaport, wherein an article identified as a "magnetic reminder wipe-off board" was classified in subheading 9610.00.00, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received concerning the matter.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is modifying NYRL 873634. Accordingly, Customs is issuing a ruling letter to reflect proper classification of the merchandise in subheading 9503.90.60, HTSUS, which provides for "Other toys * * * and accessories thereof: Other: Other: Other toys (except models), not having a spring mechanism." The ruling modifying NYRL 873634 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: September 29, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 29, 1994.

CLA–2 CO:R:C:F 956779 GGD
Category: Classification
Tariff No. 9503.90.60

MR. FRED SHAPIRO
FASCO (USA), LTD.
2 Three Gables Road
Morris Twp., NJ 07960

Re: Modification of New York Ruling Letter (NYRL) 873634; "Magnetic Reminder Wipe-off Board;" not board with writing or drawing surface.

DEAR MR. SHAPIRO:

In NYRL 873634, issued May 4, 1992, five separate articles were classified. One of the products, identified as a "magnetic reminder wipe-off board," was classified in subheading 9610.00.00, Harmonized Tariff Schedule of the United States (HTSUS), which provides for "Slates and boards, with writing or drawing surfaces, whether or not framed." We have reviewed that ruling and, with respect to the "magnetic reminder wipe-off board," have found it to be partially in error. The correct classification is as follows.

Facts:

The article at issue consists of a plastic board with magnets on the back and a magnetic marker. An impression is left when the marker is moved across the surface. The impression is removed by sliding the magnets across the back of the board. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 873634 was published on August 24, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 34.

Issue:

Whether the article is properly classified as a board with a writing surface in subheading 9610.00.00, HTSUS, or as an other toy in subheading 9503.90.60, HTSUS.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the harmonized system is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

Heading 9610, HTSUS, provides for "Slates and boards, with writing or drawing surfaces, whether or not framed." Note 1(1) to Chapter 96 states that the chapter does not cover articles of Chapter 95 (toys, games, sports equipment). The ENs to heading 9610 indicate that the heading covers slates and boards, clearly designed to be used for writing or drawing with slate pencils, chalks, felt or fibre tipped markers (e.g., school children's slates, blackboards and certain notice boards). We note that each writing or drawing instrument mentioned for use on boards of heading 9610 leaves its own mark, unlike the magnetic marker, which draws metal particles to the underlying **surface** to make the mark. Thus, the "magnetic reminder wipe-off board" is not **clearly** designed for the uses of articles classifiable in heading 9610.

Heading 9503, HTSUS, applies to "other toys," i.e., all toys not specifically provided for in the other headings of chapter 95. Although the term "toy" is not defined in the tariff, the ENs to chapter 95 indicate that a toy is an article designed for the amusement of children or adults. The magnetic board is designed to provide amusing activity involving writing,

drawing, and erasing. The ENs to heading 9503 state that the heading includes certain toys that may be capable of a limited "use," but that the heading excludes slates and blackboards of heading 9610. Since the "magnetic reminder wipe-off board" provides amusement, but is of limited use when compared to articles clearly designed to function as writing surfaces, we find that the article is properly classified as a toy.

Holding:

The "magnetic reminder wipe-off board" is classified in subheading 9503.90.60, HTSUS, the provision for "other toys * * * and accessories thereof: Other: Other: Other toys (except models), not having a spring mechanism." The applicable duty rate is 6.8 percent *ad valorem*.

NYRL 873634, dated May 4, 1992, is hereby modified.

In accordance with section 625, this ruling will become effective 60 days from its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1).

JOHN DURANT,
Director,
Commercial Rulings Division.

MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF GALVANIZED API-5L LINE PIPE

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of galvanized welded nonalloy steel line pipe conforming to American Petroleum Institute (API) Specification 5L. Notice of the proposed modification was published on August 24, 1994, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 19, 1994.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On August 24, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 34, proposing to modify New York Ruling Letter 877544, dated September 11, 1992, in which the Area Director of Customs, New York Seaport, held, in part, that certain welded nonalloy steel line pipe conforming to API Specification 5L was of a kind used for oil or gas pipelines. This pipe was held to be classifiable in subheading

7306.10.10, Harmonized Tariff Schedule of the United States (HTSUS), a provision for other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or nonalloy steel. The ruling covered both line pipe that was galvanized or coated with zinc to increase corrosion resistance, and so-called "black" or uncoated line pipe.

Four comments were received in response to the notice. Three commenters opposed the proposed modification and one favored it. All commenters agree that the provision in subheading 7306.10.10, HTSUS, is governed by use, and that the issue is whether the instant merchandise belongs to a class or kind of nonalloy steel pipe principally used for oil or gas pipelines. The commenters opposing the proposed modification contend that merchandise conforming to the API-5L specification is classifiable in subheading 7306.10.10 for several reasons: (1) domestic producers of such pipe with the API-5L specification offer galvanizing as an option; (2) use of 3-foot lengths of galvanized API-5L galvanized pipe in residential customer meter manifolds and to "gather" lines at the well-head is evidence of principal use for oil and gas pipelines; and, (3) the API-5L specification *per se* identifies the product as line pipe and that specification is silent as to galvanizing, such that both galvanized and non-galvanized line pipe are included. We disagree. The fact that API-5L pipe may be offered for sale galvanized does not bear on the issue of principal use for oil or gas pipelines as there is no indication in the record that such pipe is for use in oil or gas pipelines. The stated uses of 3-foot lengths of galvanized API-5L line pipe relates to the actual use of those lengths and is of limited value on the issue of principal use. In addition, the record is inconclusive on whether the stated use of 3-foot lengths are true oil or gas "pipeline" uses. American Petroleum Institute (API) specification 5L provides chemical, hydrostatic and mechanical standards for pipe suitable for use in conveying gas, water and oil in both the oil and natural gas industries. Galvanizing is not included within this specification. Galvanizing, usually by hot dipping, involves applying molten zinc to ferrous base metal so as to form a zinc-iron alloy for corrosion resistance. In our opinion, the presence or absence of galvanizing is critical to the issue of whether merchandise otherwise conforming to the API-5L specification is principally used for oil or gas pipelines.

Questions of use involve factual considerations and the character of the merchandise is compelling evidence. In this case, the technical information available to us indicates that galvanized pipe is unsuitable for pipeline use for both environmental and safety reasons. Certain elements in the environment where line pipe is used attack zinc, thus resulting in preferential corrosion. Likewise, zinc on the inside of the pipe will react with oil. This both contaminates the oil and promotes corrosion. Inert protective coatings such as coal tar and, more recently bonded apoxy, are preferable. In addition, because zinc is highly conductive, pipeline workers can be exposed to risk by random electrical cur-

rents. Moreover, while the API-5L specification provides both for threaded ends and plain ends for welding, continuous lengths for pipeline use are usually welded for greater structural integrity. Welding will vaporize the zinc, thus emitting toxic fumes which can prove fatal to the welder. Corrosion resistance at the joint is also compromised.

For these reasons, we are of the opinion that galvanized nonalloy steel pipe conforming to the API-5L specification for line pipe is not of a kind used for oil or gas pipelines.

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying *NY* 877544, dated September 11, 1992, to reflect the proper classification of the merchandise as other welded tubes, pipes and hollow profiles, of circular cross section, of iron or nonalloy steel, in subheading 7306.30.10, HTSUS, or subheading 7306.30.50, HTSUS, depending on wall thickness. HQ 954256 modifying *NY* 877544 is set forth in Attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1))

Dated: September 29, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 29, 1994.

CLA–2:CO:R:C:M 954256 JAS
Category: Classification
Tariff No. 7306.30.10 and 7306.30.50

MR. RALPH H. SHEPPARD, ESQ.
ADDUCI, MASTRIANI, SCHAUMBERG & SCHILL
330 Madison Avenue
New York, NY 10017

Re: Galvanized API-5L line pipe; welded tubes and pipes of nonalloy steel; subheading 7306.10.10, line pipe of a kind used for oil or gas pipelines; principal use, additional U.S. Rule 1(a), HTSUS, *HQ* 954370; Slip Op. 93–46, NY 877544 Modified.

DEAR MR. SHEPPARD:

In a letter to the Area Director of Customs, New York Seaport, dated August 18, 1992, on behalf of **Western American Mfg., Inc.,** you inquired as to the tariff classification of certain imported pipe meeting American Petroleum Institute (API) Specification 5L for line pipe.

In *NY* 877544, dated September 11, 1992, the Area Director replied to your request and confirmed that welded nonalloy steel line pipe was classifiable in subheading 7306.10.10, HTSUS. This letter represents a modification of the position expressed in *NY* 877544.

Facts:

As described in your August 18, 1992, ruling request, the pipe in issue is welded, nonalloy steel pipe in various lengths, typically 21 feet, having outside diameters ranging from 0.5 inch to 4 inches. The inquiry covered both zinc coated or galvanized pipe and uncoated or "black" pipe. Both types were said to be certified by the manufacturers as pipe satisfying the API-5L technical specification regarding pressure and burst limitations. Galvanizing of this pipe is said to be for purposes of corrosion resistance.

You stated that pipe conforming to the API-5L specification is intended to accommodate the high pressures and adverse chemical environments associated with movement by pipe of volatile petrochemical products. As such, you proposed that both types be classified under the provision for tubes, pipes and hollow profiles of iron or steel, line pipe of a kind used for oil or gas pipelines, in subheading 7306.10.10, Harmonized Tariff Schedule of the United States (HTSUS).

The provisions under consideration are as follows:

7306	Other tubes, pipes and hollow profiles (for example, open seamed or welded, riveted or similarly closed), of iron or steel:
7306.10	Line pipe of a kind used for oil or gas pipelines:
7306.10.10	Of iron or nonalloy steel * * * 1.9 percent
*	* * * * * * *
7306.30	Other, welded, of circular cross section, of iron or nonalloy steel:
7306.30.10	Having a wall thickness of less than 1.65 mm * * * 8 percent
	Having a wall thickness of 1.65 mm or more:
7306.30.50	Other * * * 1.9 percent

Issue:

Whether nonalloy steel pipe that has been galvanized belongs to a class or kind of pipe that is principally used for oil or gas pipelines.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Additional U.S. Rule of Interpretation 1(a), HTSUS, states that in the absence of special language or context which otherwise requires, a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

The language in subheading 7306.10 "of a kind used for" explicitly invokes use as a criteria for classification and in such cases principal use is controlling. **Group Italglass U.S.A., Inc. v. United States,** Slip Op. 93–46, decided March 29, 1993. For tariff purposes, principal use is that use which exceeds any other single use of the goods. *HQ* 954370, dated September 1, 1993.

Technical information available to us indicates that for both environmental and safety reasons it is not common practice to galvanize pipe used in oil or gas pipelines. Metallurgically, there are elements in the soil that tend to attack zinc and would therefore compromise its anti-corrosive qualities. Similarly, petroleum products are high in sulfur which attacks zinc, thus contaminating the petroleum and corroding the inside of the pipe. Mechanically, most oil and gas line pipe is welded end-to-end and galvanized pipe cannot be effectively welded, as the presence of zinc weakens the weld and may cause the weld point to rust. Likewise, for safety reasons it is not common practice to coat line pipe with zinc as zinc conducts electricity and would therefore attract stray underground electrical charges. In addition, heat generated by the welding process tends to vaporize the zinc which may prove hazardous to the welder.

For these and other reasons, we are of the opinion that the galvanized API-5L steel line pipe in issue does not belong to that class or kind of pipe principally used for oil or gas pipelines.

Holding:

Under the authority of GRI 1, galvanized welded nonalloy steel pipe conforming to API Specification 5L is provided for in heading 7306. However, it has not been shown to belong to a class or kind of pipe principally used for oil or gas pipelines. The pipe is classifiable in subheading 7306.30.10 or in subheading 7306.30.50, HTSUS, as appropriate, depending on wall thickness.

NY 877544, dated September 11, 1992, is modified with respect to the galvanized welded nonalloy steel pipe.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Publication of rulings or decisions does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO THE TARIFF CLASSIFICATION OF LEATHER PORTFOLIOS CONTAINING NOTE PADS

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of two leather portfolios containing note pads. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before November 18, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., Franklin Court, Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Carlos Halasz, Textile Classification Branch, (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of two leather portfolios containing note pads.

In District Ruling Letter (DD) 876202, dated July 28, 1992, two leather portfolios containing note pads were classified in heading 4202, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides in part for attache cases, briefcases and similar containers. This ruling letter is set forth in Attachment A to this document.

However, Customs has concluded that the classification of the leather portfolios in heading 4202, HTSUSA, is in error. Customs is of the opinion that the portfolios are properly classifiable in subheading 4820.10.2020, HTSUSA, which provides for memorandum pads. Customs intends to revoke DD 876202 to reflect the proper classification of the merchandise in subheading 4820.10.2020, HTSUSA.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling revoking DD 876202 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 29, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Miami, FL, July 28, 1992.

CLA–2–42–DD:C:D III:G08 DD# 876202
Category: Classification
Tariff No. 4202.11.0030 and 4202.12.2035

MR. THOMAS E. BERNSTEIN
LEEDS LEATHER PRODUCTS
4431 William Penn Highway
Murrysville, PA 15668

Re: The tariff classification of portfolios from The People's Republic of China.

DEAR MR. BERNSTEIN:

This classification decision under the Harmonized Tariff Schedule of the United States (HTS) is being issued in accordance with the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

DATE OF INQUIRY:	June 24, 1992
ON BEHALF OF:	Leeds Leather Products
DESCRIPTION OF MERCHANDISE:	Styles 1000–10 and 1000–13 are leather portfolios measuring (when closed) approximately 13.5×10.5×1 and 14.5×11×1.5 inches, respectively. Styles 0600–10 and 0600–13 are vinyl portfolios measuring (when closed) approximately 13.5×9.5×1 and 14×10.5×1.5 inches, respectively.
HTS PROVISION:	Styles 1000–10 and 1000–13—Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers with an outer surface of leather, of composition leather, or of patent leather. Styles 0600–10 and 0600–13—Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels and similar containers, with outer of plastics, other.
HTS SUBHEADING:	4202.11.0030, for styles 1000–10 and 1000–13 4202.12.2035, for styles 0500–10 and 0500–13
RATE OF DUTY:	8 percent *ad valorem* for styles 1000–10 and 1000–13 20 percent *ad valorem* for styles 0600–10 and 0600–13

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

D. LYNN GORDON,
District Director,
Miami District.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 956940 ch
Category: Classification
Tariff No. 4820.10.2020

DAVID C. NICHOLSON
IMPORT MANAGER
4431 William Penn Highway
Murrysville, PA 15668

Re: Reconsideration of DD 876202; classification of stationery articles; memorandum pad.

DEAR MR. NICHOLSON:

This is in response to your letter of August 11, 1994, requesting reconsideration of District Ruling (DD) 876202, dated July 28, 1992. DD 876202 concerned the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) for two articles described as writing pads from Hong Kong. Samples were provided to this office for examination.

Facts:

The submitted samples, styles 1000–10 and 1000–13, are portfolios which measure approximately 13½ inches by 10 inches by 1 inch. They possess an outer surface of bonded leather and man-made vinyl coskin, respectively, and are secured by means of a zipper closure. Each sample features an exterior full wall flat pocket. A note pad measuring 8½ inches by 11 inches is inserted into a slot of one interior wall. A pen holder has been placed at the spine. The opposite interior wall includes a pocket with a tapered accordion style gusset, a zippered pocket, two open pockets, an identification card holder and five slots for holding business cards.

In DD 876202, styles 1000–10 and 1000–13 were classified respectively in subheadings 4202.11.0030 and 4202.12.2035, Harmonized Tariff Schedule of the United States (HTSUS), as containers similar to attache cases and briefcases.

Issue:

What is the proper tariff classification for the subject merchandise?

Law and Analysis:

Heading 4820, HTSUSA, provides in part for diaries, notebooks, memorandum pads and other articles of stationery, of paper or paperboard. The Explanatory Note (EN) to heading 4820 states in pertinent part, at page 687, that:

> This heading covers various articles of stationery, other than correspondence goods of heading 4817 and the goods referred to in Note 9 to this Chapter. It includes:
>
> * * * * * * *
>
> (1) Registers, account books, note books of all kinds, order books, receipt books, copy books, diaries, letter pads, memorandum pads, engagement books, address books and books, pads, etc. for entering telephone numbers.
>
> * * * * * * *
>
> (3) **Binders designed for holding loose sheets,** magazines, or the like (e.g. clip binders, spring binders, screw binders, **ring binders), and folders, file covers,** (other than box files) **and portfolios.**
>
> * * * * * * *
>
> (8) **Book covers (binding covers and dust covers),** whether or not printed with characters (title, etc.) or illustrations.
>
> * * * * * * *
>
> **The goods of this heading may be bound with materials other than paper (e.g. leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc.** (Emphasis added).

This language indicates that articles of 4820, HTSUSA, include portfolios, ring binders and folders designed for holding papers. They also include articles of the heading that are bound with leather or textile material. Heading 4820 encompasses articles of stationery with jackets or covers.

In Headquarters Ruling Letter (HRL) 951076, dated March 18, 1992, issued to Leeds Leather Products, we classified the "President Writing Pad," which was described as follows:

> The second item, "President Writing Pad," is a 9½ by 12½ inch leather folder containing an 8½ by 11 inch pad of lined writing paper. The cardboard backing sheet of the pad is slipped into a large pocket inside the leather folder, which also incorporates a pen holder and an additional pocket for loose papers.

In that decision, we noted that memorandum pads were classifiable in heading 4820, HTSUSA. Citing lexicographic sources, we concluded that a memorandum pad is "an article featuring a block of blank pages attached at one end to facilitate note taking." The paper writing pad met the description of a memorandum pad. Moreover, we determined that the leather folder merely emphasized the primary purpose of the article, which was to provide a convenient and organized method to take notes. Accordingly, the "President Writing Pad" was classifiable as a memorandum pad of subheading 4820.10.2020, HTSUSA.

Styles 1000–10 and 1000–13 are substantially similar in design and function to the "President's Writing Pad." Although the portfolios are somewhat more elaborate than the folder at issue in HRL 951076, they function primarily as organizational aids for note taking. Consequently, styles 1000–10 and 1000–13 are also classifiable as memorandum pads of subheading 4820.10.2020, HTSUSA.

Holding:

DD 876202 is hereby revoked. Styles 1000–10 and 1000–13 are classifiable under subheading 4820.10.2020, HTSUSA, which provides for memorandum pads, letter pads and similar articles. The applicable rate of duty is 4 percent *ad valorem*.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF SURGICAL MICROSCOPES

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of surgical microscopes. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before November 18, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Altneu, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of surgical microscopes.

In Headquarters Ruling Letter (HQ) 954362, issued on June 30, 1993, by Customs Headquarters, certain surgical microscopes were classified under subheading 9018.90.20, HTSUS, which provides for other optical instruments used in surgical sciences. HQ 954362 is set forth as "Attachment A" to this document.

Customs Headquarters is of the opinion that HQ 954362 erroneously classified the subject surgical microscopes under subheading 9018.90.20, HTSUS. Customs intends to revoke HQ 954362 to reflect the proper classification of the surgical microscopes under subheading 9011.10.80, HTSUS, as other compound optical microscopes.

Before taking this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling 956638 revoking HQ 954362 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 28, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 30, 1993.

CLA–2 CO:R:C:M 954362 DWS
Category: Classification
Tariff No. 9018.90.20

MR. CHRIS WALLACE
JAGRO AIR SERVICES, INC.
Airport Industrial Office Park
145th Avenue & Hook Creek Boulevard
Building #C–5D
Valley Stream, NY 11581

Re: Surgical microscope; compound optical microscope; Explanatory Note 90.11; 9011.80.00.

DEAR MR. WALLACE:

This is in response to your letter of May 11, 1993, to the Chief, Customs Information Exchange, on behalf of Moeller Microsurgical, Inc., concerning the classification of a surgical microscope under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter has been referred to Headquarters for a reply.

Facts:

The merchandise consists of a binocular surgical microscope, used by surgeons when operating on a very small area of the body. It possesses a microscope arm, with a light source built into the arm. The microscope may be mounted to a ceiling or to a floor stand, and the arm has free-floating movement capability in all directions.

The subheadings under consideration are as follows:

9011.80.00: [c]ompound optical microscopes, including those for photomicography, cinemicrography or microprojection; parts and accessories thereof: [o]ther microscopes.

The general, column one rate of duty is 8 percent *ad valorem*.

9018.90.20: [i]nstruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electromedical apparatus and sight-testing instruments; parts and accessories thereof: [o]ther instruments and appliances and parts and accessories thereof: [o]ther.

The general, column one rate of duty is 10 percent *ad valorem*.

Issue:

Whether the surgical microscope is classifiable under subheading 9011.80.00, HTSUS, as an other microscope, or under subheading 9018.90.20, HTSUS, as an other optical instrument used in surgical science?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes, although not dispositive, are to be used to determine the proper interpretation of the HTSUS. 54 Fed. Reg. 35127, 35128 (August 23, 1989). In part, Explanatory Note 90.11 (pp. 1475–1476) states that:

> * * * the **compound optical microscope** of this heading has a second stage of magnification for the observation of an already magnified image of the object.
>
> A compound optical microscope normally comprises:
>
> (I) An optical system consisting essentially of an objective designed to produce a magnified image of the object, and an eyepiece which further magnifies the observed image. The optical system usually also incorporates provision for illuminating the object from below (by means of a mirror illuminated by an external or an integral light source), and a set of condenser lenses which direct the beam of light from the mirror on to the object.
>
> (II) A specimen stage, one or two eyepiece-holder tubes (according to whether the microscope is the monocular or binocular type), and an objective-holder generally revolving.
>
> * * * This heading covers microscopes as used by amateurs, teachers, etc., and those for industrial use or for research laboratories * * *

It is our position that, based upon the description given in Explanatory Note 90.11, the surgical microscope is not a compound optical microscope. It does not have a second stage of magnification for the observation of an already magnified image of an object. The microscope is used to perform microsurgery on a human body; it is not used to study and observe a certain object for laboratory research or industrial purposes. Also, the surgical microscope does not possess a specimen stage or an objective holder.

Therefore, because the surgical microscope is not described under heading 9011, HTSUS, we find that it is classifiable under subheading 9018.90.20, HTSUS, as an other optical instrument used in surgical science.

Holding:

The surgical microscope is classifiable under subheading 9018.90.20, HTSUS, as an other optical instrument used in surgical science.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:M 956638 RFA
Category: Classification
Tariff No. 9011.10.80

MR. CHRIS WALLACE
JAGRO AIR SERVICES, INC.
Airport Industrial Office Park
145th Avenue & Hook Creek Boulevard
Building #C–5D
Valley Stream, NY 11581

Re: Moeller Microsurgical surgical microscope; compound optical microscope; EN 90.11; heading 9018; HQs 085754, 088121; HQ 954362, revoked.

DEAR MR. WALLACE:

This is in reference to HQ 954362, issued to you on June 30, 1993, on behalf of Moeller Microsurgical, Inc., in which the tariff classification of a surgical microscope was determined under the Harmonized Tariff Schedule of the United States (HTSUS).

Facts:

The subject merchandise consists of a binocular surgical microscope, used by surgeons when operating on a very small area of the body. The microscope contains double eyepieces and objectives with independent light paths, and thus creates a three-dimensional image. The merchandise possesses a microscope arm, with a light source built into the arm. The microscope may be mounted to a ceiling or to a floor stand, and the arm has free-floating movement capability in all directions.

The subheadings under consideration are as follows:

9011.10:	Compound optical microscopes, including those for photomicrography, cinemicrography or micro projection * * *: [s]tereoscopic microscopes:
9011.10.40	Provided with the means for photographing the image * * *.
	Goods classifiable under this provision have a general, column one rate of duty of 4.9 percent *ad valorem*.
9011.10.80	Other.
	Goods classifiable under this provision have a general, column one rate of duty of 9 percent *ad valorem*.
9018	Instruments and appliances used in medical, surgical * * * sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments * * *:
9018.90.20	Other instruments and appliances and appliances and parts and accessories thereof: [o]ptical instruments and appliances. [o]ther * * *.
	Goods classifiable under this provision have a general, column one rate of duty of 10.0 percent *ad valorem*.

Issue:

Whether the ophthalmic surgical microscope is classifiable as a compound optical microscope or as a surgical microscope under the HTSUS?

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes.

In HQ 954362, dated June 30, 1993, Customs classified the surgical microscopes, as other optical instruments used in surgical science under subheading 9018.90.20, HTSUS. Customs based this decision upon the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) to heading 9011, HTSUS. The ENs constitute the Customs Cooperation Council's official interpretation of the HTSUS. While not legally bind-

ing, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. EN 90.11, pages 1475–1476, states that:

> * * * the compound optical microscope of this heading has a second stage of magnification for the observation of an already magnified image of the object.
>
> A compound optical microscope normally comprises:
>
> (I) An optical system consisting essentially of an objective designed to produce a magnified image of the object, and an eyepiece which further magnifies the observed image. The optical system usually also incorporates provision for illuminating the object from below (by means of a mirror illuminated by an external or an integral light source), and a set of condenser lenses which direct the beam of light from the mirror on to the object.
>
> (II) A specimen stage, one or two eyepiece-holder tubes (according to whether the microscope is the monocular or binocular type), and an objective-holder (generally revolving).
>
> * * * This heading covers microscopes as used by amateurs, teachers, etc., and those for industrial use or for research laboratories * * *.

After citing EN 90.11, Customs determined that the subject microscope did not meet the definition because: it did not have a second stage of magnification; it was used to perform microsurgery on a human body, and not used to study and observe objects for laboratory research or industrial purposes.

Customs has since learned that the surgical microscope does meet the definition for compound optical microscopes for heading 9011, HTSUS, because it has a second stage of magnification for the observation of an already magnified image of an object. EN 90.18, pages 1487–1488, states in pertinent part:

> This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc. * * *
>
> The heading **does not cover:**
>
> * * * * * * *
>
> (ij) Microscopes, etc., of heading 90.11 or 90.12.

Because the subject merchandise meets the definition of compound optical microscopes covered under heading 9011, HTSUS, classification under heading 9018, HTSUS, is precluded.

The only remaining issue is whether the subject microscopes are provided with the means for photographing the image. Customs has consistently determined that microscopes capable of photomicrography, but which were imported without the device for photographing an image, cannot be considered to be "provided with a means for photographing the image". *See* HQ 088121, dated February 26, 1991; HQ 085754, dated December 26, 1989. According to the invoices, the subject merchandise was imported without the means for photographing the images. Therefore, we find that the surgical microscopes are to be classified as compound optical microscopes, provided without the means for photographing the image, under subheading 9011.10.80, HTSUS.

Holding:

Under the authority of GRI 1, the surgical microscope is provided in heading 9011, HTSUS. It is classifiable under subheading 9011.10.80, HTSUS, which provides for: "[c]ompound optical microscopes, including those for photomicrography, cinemicrography or micro projection * * *: [s]tereoscopic microscopes: [o]ther * * *." Goods classifiable under this provision have a general, column one rate of duty of 9 percent *ad valorem*.

Effect on Other Rulings:

HQ 954362, dated June 30, 1993, is revoked.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF ELECTRONIC CURRENCY EXCHANGE RATE DISPLAY BOARDS

ACTION: Notice of proposed revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of electronic currency exchange rate display boards. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before November 18, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, NW, (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Larry Ordet, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling pertaining to the tariff classification of electronic currency exchange rate display boards. In New York Ruling Letter (NY) 856403, issued on October 9, 1990, electronic currency exchange rate display boards were held to be classifiable under subheading 8543.80.90 (now, 8543.80.75), HTSUS, which provides for other electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter. The ruling letter is set forth in Attachment A to this document.

Customs Headquarters is of the opinion that the electronic currency exchange rate display boards are classifiable under subheading 8531.20.00, HTSUS, which provides for electric sound signaling apparatus; indicator panels incorporating liquid crystal devices (LCD's) or light emitting diodes (LED's).

Customs intends to revoke NY 856403 to reflect the proper classification of the product in subheading 8531.20.00, HTSUS. Before taking

this action, consideration will be given to any written comments timely received. Proposed Headquarters ruling letter (HQ) 957078 revoking NY 856403 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 29, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, October 9, 1990.

CLA–2–85:S:N:N1B: 112 856403
Category: Classification
Tariff No. 8543.80.9080

MR. WILLIAM B. ABOTT
ABOTT ASSOCIATED
195 Hudson Street
New York, NY 10013

Re: The tariff classification of a foreign exchange rates currency display board from Taiwan.

DEAR MR. ABOTT:

This classification decision under the Harmonized Tariff Schedule of the United States (HTS) is being issued in accordance with the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

DATE OF INQUIRY:	September 11, 1990.
DESCRIPTION OF MERCHANDISE:	Model Ratex–1826 is an electronic display board operated by an infrared remote control keyboard. It displays foreign currency rates for up to 18 rows and 2 columns and has an RS–232–C port for computer interface. It may operate on 110V/60HZ or 220V/50HZ and has a built in Timer, Date, and Auto On/Off. It may be used in banks, hotels, airports, money exchanges, jewelry stores, and other similar areas.
HTS PROVISION:	Electric machines and apparatus, having individual functions, not specified or included elsewhere in the chapter: Other machines and apparatus. Other * * * Other * * *
HTS SUBHEADING:	8543.80.9080.
RATE OF DUTY:	3.9 percent *ad valorem*.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:M 957078 LTO
Category: Classification
Tariff No. 8531.20.00

MR. WILLIAM B. ABOTT
ABOTT ASSOCIATED
195 Hudson Street
New York, NY 10013

Re: Electronic currency exchange rate board; HQs 083609, 086032, 088225, 950407, 955448; NY 848860; NY 856403 *revoked;* subheading 8543.80.90; section XVI, note 4.

DEAR MR. ABOTT:

This is in reference to NY 856403, issued to you on October 9, 1990, which concerned the classification of electronic currency exchange rate board (model Ratex–1826) under the Harmonized Tariff Schedule of the United States (HTSUS). This is a reconsideration of NY 856403.

Facts:

The articles in question are electronic currency exchange rate boards. The boards use light emitting diode (LED) displays to indicate foreign currency exchange rates to customers in banks, hotels, airports, money exchange release stores, etc. The model in question, the RATEX 1826, has two columns ("WE BUY AT," "WE SELL AT") and 18 rows (listing the names of the relevant countries). The boards are imported with infrared remote control keyboards which are used to change the boards' rates.

In NY 856403, the boards (with remote control keyboards) were held to be classifiable under subheading 8543.80.90 (now, 8543.80.75), HTSUS, which provides for other electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter.

Issue:

Whether the electronic currency exchange rate boards are classifiable as indicator panels incorporating liquid crystal devices (LCD's) or light emitting diodes (LED's) under subheading. 8531.20.00, HTSUS.

Law and Analysis:

The General Rules of Interpretation (GRI's) to the HTSUS govern the classification of goods in the tariff schedule. GRI 1 states in pertinent part that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *."

The subheadings at issue are as follows:

8531	Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof:
8531.20.00	**Indicator panels incorporating liquid crystal devices (LCD's) or light emitting diodes (LED's) (2.7% *ad valorem*)**
*	* * * * * * *
8543	Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:
	Other machines and apparatus:
	Other:
8543.80.90	**Other (3.9% *ad valorem*)**

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the Customs Co-operation Council's official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

EN 85.31, pg. 1381, states that heading 8531, HTSUS, "covers all electrical apparatus used for signalling purposes, whether using sound for the transmission of the signal (bells, buzzers, hooters, etc.) or using visual indication (lamps, flaps, illuminated numbers, etc.), and whether operated by hand (e.g., door bells) or automatically (e.g., burglar alarms)." The heading covers 'signaling' indicator panels which "are used (e.g., in offices, hotels and factories) for calling personnel, indicating where a certain person or service is required, indicating whether a room is free or not. They include:"

(1) xxx
(2) **Number indicators.** The signals appear as illuminated figures on the face of a small box * * *.
(3)–(5) xxx
(6) **Station indicating panels** for showing the times and platforms of trains.
(7) **Indicators for race courses, football stadiums, bowling alleys, etc.**

EN 85.31, pg. 1381–2 [emphasisin original].

In HQ 086032, dated January 17, 1990, we considered the classification of message display centers, which were used to advertise merchandise, state greetings, and to generally attract a person's attention to a particular store or service, or to the message display itself. The displays included a computer program which allowed the user to create full color animation, graphics and text. In finding that the displays were not covered by heading 8531, HTSUS, we stated as follows:

> [T]he message display centers perform a function which is different than that of signalling equipment. Although the instant merchandise can flash graphics or animation to call a person's attention to the display, its primary purpose is to convey a *substantive* message; this function is more than that of signalling equipment which is designed to provide a signal to a viewer who normally will instantaneously understand the meaning of the signal [underlining in original].

We then held that the displays were classifiable under subheading 8543.80.90, HTSUS. *See also* HQ 955448, dated February 23, 1994; NY 848860, dated February 2, 1990.

The electronic currency exchange rate boards are not "moving" message displays, nor do they display full color animation or graphics. While they arguably convey a substantive "message," it is the type of "message" contemplated by heading 8531, HTSUS.

In HQ 088225, dated January 31, 1991, we considered the classification of Electronic Shelf Tags, which acted as illuminated numerical displays for grocery store products' price information. The Shelf Tags visually signaled certain data in numerical form to customers. We held that, according to EN 85.31, number indicators, such as the Shelf Tags, were classifiable as visual signaling apparatus under subheading 8531.20.00, HTSUS.

The electronic currency exchange rate boards use LED displays to indicate foreign currency exchange rates to customers in banks, hotels, airports, money exchange release stores, etc. The limited information supplied by the electronic currency rate exchange boards is similar to that supplied by the Electronic Shelf Tags of HQ 088225, and similar to that supplied by indicating panels of EN 85.31 for showing the times and platforms of trains.

Moreover, the method used by the electronic currency exchange rate boards to supply information is similar to that used by stadium scoreboards. Recently, in HQ 955448, dated February 23, 1994, we stated that the indicators for football stadiums covered by heading 8531, HTSUS, are devices "which show numbers in correspondence with such limited language as 'time outs remaining,' 'quarter,' 'home' and 'visitor,' and 'time remaining.'" The electronic currency exchange rate boards are signs which show numbers in correspondence with such limited language as "WE BUY AT" and "WE SELL AT," along with rows listing the names of the relevant countries. Accordingly, the electronic currency rate boards are classifiable under heading 8531, HTSUS.

With regard to the infrared remote control keyboards that are imported with the boards, note 4 to section XVI, HTSUS, provides as follows:

> Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function.

The electronic currency exchange rate boards and infrared remote control keyboards, which are used to change the boards' rates, contribute together to a clearly defined function described by heading 8531, HTSUS. Thus, they are a "functional unit," and the

boards and keyboards are classifiable together under subheading 8531.20.00, HTSUS. *See* HQ 950407, dated November 15, 1991; HQ 083609, dated June 6, 1989.

As stated above, the boards and infrared remote control keyboards were held to be classifiable under heading 8543, HTSUS, which provides for electrical machines and apparatus, not specified or included elsewhere. As these boards are described in heading 8531, HTSUS, they cannot be classified under heading 8543, HTSUS. It is therefore necessary to revoke NY 856403.

Holding:

The electronic currency exchange rate boards (and remote control keyboards) are classifiable under subheading 8531.20.00, HTSUS. The corresponding rate of duty for articles of this subheading is 2.7% *ad valorem*.

NY 856403 is revoked accordingly.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WROUGHT IRON PEDESTALS WITH GLASS VESSELS

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of wrought iron pedestals with glass vessels. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before November 18, 1994.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC, 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Kathleen Clarke, Metals and Machinery Classification Branch, (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L.

103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of wrought iron pedestals with glass vessels.

In New York Ruling (NY) 875420 dated July 2, 1992, wrought iron pedestals with glass vessels were classified under subheading 8306.29.00, Harmonized Tariff Schedule of the United States (HTSUS), as other statuettes and other ornaments, of base metal. This ruling letter is set forth in Attachment A to this document.

Customs Headquarters recently issued Headquarters Ruling Letter (HRL) 956048 dated July 7, 1994, which classified another iron pedestal with glass vessel under subheading 7013.99.90, HTSUS, as other glassware, valued over $5 each. HRL 956048 determined that the iron pedestal with glass vessel was a composite good with the essential character imparted by the glass vessel.

Customs intends to modify NY 875420 to reflect the proper classification of the subject article under subheading 7013.99.90, HTSUS, as other glassware, valued over $5 each. Proposed HRL 956810 modifying NY 875420 is set forth inAttachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 29, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, July 2, 1992.

CLA–2–83:S:N:N1:113 875420
Category: Classification
Tariff No. 8306.29.0000,
7013.99.9000 and 9405.50.4000

MR. HECTOR M. CABALLERO
CABALLERO BROKERS, INC.
1000 Washington St., Ste. #2
Laredo, TX 78040

Re: The tariff classification of decorative wrought ironware from Mexico.

DEAR MR. CABALLERO:

In your letter dated June 15, 1992, on behalf of Tucan International, you requested a tariff classification ruling.

There are three items involved. The first is a floor standing decorative vase of wrought iron holding a band-blown glass insert which cannot stand on its own.

The second item is a decorative bowl/centerpiece. This bowl is also of wrought iron with a glass insert. Your letter states that this item is priced at approximately $10.00.

The third item is a wrought iron candlestick.

The applicable subheading for the decorative vase will be 8306.29.0000, Harmonized Tariff Schedule of the United States (HTS), which provided for statuettes and other ornaments. The rate of duty will be 5% *ad valorem*.

The applicable subheading for the bowl/centerpiece will be 7013.99.9000, Harmonized Tariff Schedule of the United States (HTS), which provides for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes, other glassware, other, other, other, valued over $5 each. The rate of duty will be 7.2% *ad valorem*.

The applicable subheading for the candlestick holder will be 9405.50.4000, Harmonized Tariff Schedule of the United States (HIS), provides for non-electrical lamps and lighting fittings, other. The rate of duty will be 7.6% *ad valorem*.

Articles classifiable under subheadings 9405.50.4000 and 8306.29.0000, HTS, which are products of Mexico are entitled to duty free treatment under the Generalized System of Preferences (GSP) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:M 956810 KCC
Category: Classification
Tariff No. 7013.99.90

MR. HECTOR M. CABALLERO
CABALLERO BROKERS, INC.
1000 Washington St., Ste. #2
Laredo, TX 78040

Re: Wrought iron pedestals with glass vessels; NY 875420 modified; GRI 3(b); essential character; General EN Rule 3(b) (IX); composite good; EN 70.13; HRL 956048; 9403; furniture; General EN (A) to Chapter 94; *Sprouse Reitz & Co.; Furniture Import Corp.;* 8306; statuettes and other ornaments, of base metal; EN 83.06.

DEAR MR. CABALLERO:

This is in reference to New York (NY) 875420 issued to you on July 2, 1992, by the Area Director of Customs, New York Seaport, on behalf of Tucan International, which concerned the tariff classification of several articles under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed this ruling and determined that the classification of the wrought iron pedestals with glass vessels is incorrect.

Facts:

In your letter of June 15, 1992, you described the three different sized wrought iron pedestals with glass vessels as follows:

> FLOOR STANDING VASE (DECORATIVE). THIS VASE-STAND IS CONSTRUCTED OF WROUGHT IRON AND HAS A HAND BLOWN GLASS STAND BY ITSELF EITHER ON THE FLOOR OR TABLE. THIS GLASS INSERT WITH A CONCAVE BOTTOM WHICH WILL NOT ALLOW IT TO CONCAVE VASE WILL BE PACKAGED SEPARATELY AND SOLD AS A COMPLIMENT (SET) OF THE WROUGHT IRON STAND. THE VALUE OF THIS ITEM IS APPROXIMATELY $18.00—$13. STAND $5. GLASS. WEIGHT OF THIS ITEM IS APPROXIMATELY 28% (LARGE), 33% (MEDIUM), 42% (SMALL) GLASS AND THE REMAINDER OP IRON RESPECTIVELY.

NY 875420 classified the wrought iron pedestals with glass vessels under subheading 8306.29.00, HTSUS, which provides for "Bells, gongs and the like, nonelectric, of base metal; statuettes and other ornaments, of base metal; photograph, picture or similar frames, of base metal; mirrors of base metal; and base metal parts thereof * * * Statuettes and other ornaments and parts thereof * * * Other."

Issue:

What is the tariff classification of the wrought iron pedestals with glass vessels under the HTSUS?

Law and Analysis:

The classification of merchandise under the HTSUS is governed by the General Rules of Interpretation (GRI's). GRI 1, HTSUS, states, in part, that "for legal purposes, classification shall be determined according to terms of the headings and any relative section or chapter notes * * *."

When, by application of GRI 2, HTSUS, goods are *prima facie* classifiable under two or more headings, GRI 3, HTSUS, is applicable. In this case, classification is determined by application of GRI 3(b), HTSUS, which provides:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

Explanatory Note (EN) Rule 3(b) (IX) of the Harmonized Commodity Description and Coding System (HCDCS) states that:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually Complementary and that together they form a whole which would not normally be offered for sale in separate parts (emphasis in original).

The ENs, although not dispositive, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the HTSUS. *See,* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

In this case, we are of the opinion that the wrought iron pedestal with glass vessel is not a set, but is a composite good. The components of the article, the wrought iron pedestal and glass vessel, are adapted one to the other, mutually complementary, and together form a whole which would not normally be offered for sale in separate parts. Therefore, we need to determine which component imparts the essential character.

In general, essential character has been construed to mean the attribute which strongly marks or serves to distinguish what an article is; that which is indispensable to the structure, core or condition of the article. In addition, EN Rule 3(b) (pg. 4), provides further factors which help determine the essential character of goods. Factors such as bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods are to be utilized, though the importance of certain factors will vary between different kinds of goods.

Based on the information submitted, we are of the opinion that the essential character of the wrought iron pedestal with glass vessel is the glass vessel. The glass vessel is the component with distinguishes the article. It is the more attractive component which appeals to the consumer. The glass is the component which fulfills the function of the article; it holds the object to be displayed such as, flowers, plants, wine bottles, candles, etc. The wrought iron pedestal merely supports the glass vessel. Therefore, the glass vessel imparts the essential character to the wrought iron pedestal with glass vessel. *See,* Headquarters Ruling Letter (HRL) 956048 dated July 7, 1994, which determined that an iron pedestal with glass vessel was a composite good with the essential character imparted by the glass vessel.

The glass vessel is classified under heading 7013, HTSUS, which provides for "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018) * * *." EN 70.13 (pgs. 936–936a), states that heading 7013, HTSUS, covers:

> **Glassware for indoor decoration** and other glassware (including that for churches and the like), such as vases, ornamental fruit bowls, statuettes, fancy

> articles (animals, flowers, foliage, fruit etc.) table centres (**other than** those of **heading 70.09**), aquaria, incense burners, etc., and souvenirs bearing views (emphasis in original).

The glass vessel is ornamental glassware similar to a vase, although as you stated, it can not stand by itself. Even though the glass vessel can be used for both indoor and outside decoration, it is of the class or kind of article classifiable under heading 7013, HTSUS. Inasmuch as the essential character is imparted by the glass vessel, the entire composite good (wrought iron pedestal with glass vessel) is, therefore, classified under the tariff classification of the glass vessel. As the value of the wrought iron pedestal with glass vessel is over $5 each, it is classified under subheading 7013.99.90, HTSUS, as other glassware, valued over $5 each. *See*, HRL 956048 which classified an metal iron pedestal with glass vessel under subheading 7013.99.90, HTSUS, as other glassware, valued over $5 each.

Consideration was also given as to whether the wrought iron pedestal with glass vessel may be classifiable under heading 9403, HTSUS, which provides for "Other furniture and parts thereof * * *." General EN (A) to Chapter 94 (pg. 1574), defines furniture as:

> Any "movable" articles (**not** included under other more specific headings of the Nomenclature), which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose, to equip private dwellings, hotels, theatres, cinemas, offices * * *. Similar articles (seats, chairs, etc.) for use in gardens, squares, promenades, etc., are also included in this category (emphasis in original).

The wrought iron pedestal with glass vessel is a movable article which is constructed for placing on the floor or ground. However, we are of the opinion that the article is not mainly used for a utilitarian purpose. In determining whether certain articles are classifiable as furniture, there is a clear distinction between an article of utility and those used primarily for ornamentation. *See, Sprouse Reitz & Co., v. United States*, 67 Cust. Ct. 209, C.D. 4276 (1971), and *Furniture Import Corp., v. United States*, 56 Cust. Ct. 125, C.D. 2619 (1966).

The wrought iron pedestal with glass vessel is a subsidiary article designed for ornamentation. It is not an article designed for a utilitarian purpose. Moreover, you have described this article as "DECORATIVE." Therefore, the wrought iron pedestal with glass vessel is not classified as furniture under heading 9403, HTSUS.

NY 875420 classified the wrought iron pedestal with glass vessel under subheading 8306.29.00, HTSUS, as other statuettes and other ornaments, of base metal. EN 83.06 (pg. 1122), states that statuettes and other ornaments:

> * * * comprises a wide range of ornaments of base metal (whether or not incorporating subsidiary non-metallic parts) of a kind **designed essentially for decoration,** e.g., in homes, offices, assembly rooms, churches, gardens (emphasis in original).

The wrought iron pedestal has a glass vessel, which in our opinion is not a subsidiary non-metallic part. Therefore, the wrought iron pedestal with glass vessel is not classifiable under subheading 8306.29.00, HTSUS.

Holding:

The wrought iron pedestals with glass vessels are composite goods with the essential character imparted by the glass vessels.

Therefore, they are classified under subheading 7013.99.90, HTSUS, as other glassware, valued over $5 each.

NY 875420 is modified as directed above.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF A FOOD SUPPLEMENT ALTERNATIVELY KNOWN AS POLYMEGA AND PCM-4 AND A FOOD SUPPLEMENT KNOWN AS POLYERGA II

ACTION: Notice of proposed modification of tariff classification rulings.

SUMMARY: Pursuant to section 625 of the Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of a food supplement alternatively known as Polymega and PCM-4 and a ruling pertaining to a food supplement known as polyerga II which is very similar to Polymega/PCM-4.

DATE: Comments must be received on or before November 18, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W. (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, N.W., Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625 of the Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of Polymega/PCM-4, a food supplement, and a ruling pertaining to the tariff classification of Polyerga II, a food supplement.

In New York Ruling Letter (NYRL) 848458, issued January 22, 1990, by the Area Director, NY Seaport Area, Customs held that Polymega was classified under subheading 3823.90.5050, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which was stated to be a provision for chemical mixtures not elsewhere provided for. Customs also held in NYRL 848070, issued December 21, 1989, by the Area Director, NY Seaport Area, that Polyerga II, virtually the same product, was classified under the above-noted subheading. Copies of the above rulings are set forth in Attachments A and B to this document.

Customs Headquarters is of the opinion that NYRL 848458 and NYRL 848070 erroneously classified the food supplements known as

Polymega and Polyerga II under subheading 3823.90.5050, HTSUSA, a provision covering, as herein pertinent, chemical products and preparations of the chemical or allied industries (including those consisting of mixture of natural products), not elsewhere specified or included. In considering this matter we concluded that these products are provided for in subheading 2106.90.6999, HTSUSA. In reaching this conclusion we consulted the Explanatory Notes to the Harmonized System (EN) which represent the opinion of the international classification experts. We noted that EN 21.06(B)(16) provides that food supplements are classifiable under heading 2106. Further, we noted NYRL 864642, issued July 12, 1991, (Attachment C) to the same importer as the prior rulings and covering a product labelled PCM-4, which is essentially identical to Polymega and Polyerga II. That ruling held that PCM-4 was classifiable in subheadings 2106.90.6097 or 2106.90.6099, HTSUSA, depending on whether it was in tablet or capsule form. (The current HTSUSA subheading number is 2106.90.6999, HTSUSA.) We believe that this classification is correct and that NYRL 848458 and NYRL 848070 should be modified to conform thereto.

Before taking this action, consideration will be given to any written comments timely received. The proposed ruling modifying NYRL 848458 and NYRL 848070 is set forth in Attachment D to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: October 3, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 21, 1989.
CLA–2–38:S:N:N1:235 848070
Category: Classification
Tariff No. 3823.90.5050

MR. JOHN M. MAYHALL, JR.
PRESIDENT
OMEGA PHARMACEUTICALS, INC.
P.O. Box 43512
Birmingham, AL 35243–0612

Re: The tariff classification of Polyerga II from West Germany.

DEAR MR. MAYHALL:

In your letter dated December 7, 1989, you requested a tariff classification ruling.

According to your inquiry, this product is composed of many amino acids plus additional protein matter. It is to be used as a nutritional food supplement. You further state that it is

your belief that this product is classifiable in 2922.49.4050 (HTS). We cannot agree. The subheading you refer to provides for individual amino acids and is limited to single compounds. We believe this product to be more accurately described in Chapter 38 which provides for mixtures of chemicals.

Therefore the applicable subheading for Polyegra II will be 3823.90.5050, Harmonized Tariff Schedule of the United States (HTS), which provides for chemical mixtures not elsewhere provided for. The rate of duty will be 5 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, January 22, 1990.

CLA–2–38:S:N:N1:235 848458
Category: Classification
Tariff No. 3823.90.5050

MR. JOHN M. MAYHALL, JR.
PRESIDENT
OMEGA PHARMACEUTICAL, INC.
P.O. Box 43612
Birmingham, AL 35243–0612

Re: The tariff classification of Polymega from West Germany.

DEAR MR. MAYHALL:

In your letter dated January 4, 1990 you requested a tariff classification ruling.

According to your letter, this product is composed of an assortment of amino acids and residue protein and is used as a food or nutritional supplement.

The applicable subheading for Polymega will be 3823.90.5050, Harmonized Tariff Schedule of the United States (HTS), which provides for chemical mixtures not elsewhere provided for. The rate of duty will be 5 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, July 12, 1991.

CLA–2–21:S:N:N1:223
Category: Classification
Tariff No. 2106.90.6097 and 2106.90.6099

MR. JOHN M. MAYHALL, JR.
OMEGA NUTRITION, INC.
3021 Lorna Road, Suite 300
Birmingham, AL 35216

Re: The tariff classification of a food supplement from Germany.

DEAR MR. MAYHALL:

In your letter dated June 11, 1991, you requested a tariff classification ruling.

An ingredients breakdown and sample package accompanied your letter. "PCM-4" is a food supplement in tablet and capsule form. The primary ingredient in the tablets are polypeptides derived from bovine spleen extract. Other ingredients include sucrose, talc, and corn starch. The main ingredients in the capsules are lactose, gelatin, vegetable oils, and polypeptides derived from bovine spleen extract. The products are put up in retail packages containing 15 capsules and 90 tablets.

The applicable subheading for the PCM-4 tablets will be 2106.90.0097, Harmonized Tariff Schedule of the United States (HTS), which provides for food preparations not elsewhere specified or included * * * other * * * other * * * containing sugar derived from sugar cane and/or sugar beets. The rate of duty will be 10 percent *ad valorem*.

The applicable subheading for the PCM-4 capsules will be 2106.90.6099, HTS, which provides for food preparations not elsewhere specified or included * * * other * * * other * * * other. The rate of duty will be 10 percent *ad valorem*.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:F 956890 ALS
Category: Classification
Tariff No. 2106.90.6999

MR. JOHN M. MAYHALL, JR.
PRESIDENT
OMEGA PHARMACEUTICAL, INC.
1000 Urban Center Parkway
Birmingham, AL 35243

Re: Modification of New York Ruling Letters (NYRL) 848070 and 848458, concerning food supplements alternately known as PCM-4, Polymega and Polyerga II.

DEAR MR. MAYHALL:

In NYRL 848070, issued December 21, 1989, you were advised that a food supplement known as Polyerga II was classified in subheading 3823.90.5050, Harmonized Tariff

Schedule of the United States Annotated (HTSUSA). In NYRL 848458, issued January 22, 1990, you were advised that a food supplement known as Polymega was classified in subheading 3823.90.5050, HTSUSA. We have reviewed those rulings and NYRL 864642, issued July 12, 1991, in which you were advised that a food supplement known as PCM-4 was classified in 2106.90.6097 or 2106.90.6099, HTSUSA, depending on whether it was in tablet or capsule form. We have concluded that the correct classification for all of these food supplements is as follows.

Facts:

These food supplements are in tablet and capsule form. The primary ingredient in the tablets are polypeptides derived from bovine spleen extract. Other ingredients include sucrose, talc, and corn starch. The main ingredients in the capsules are lactose, gelatin, vegetable oils and polypeptides derived from bovine spleen extract. The products are put up in retail packages containing 15 capsules or 90 tablets. The information and documents submitted for these products indicate that the composition and use of the food supplements is virtually identical. The "flow chart" describing the manufacturing process is essentially the same for all the products and the ingredient listings are interchangeable.

Issue:

Are the products classifiable as food supplements in subheading 2106.90.6999, HTSUSA, or in subheading 3823.90.5050, HTSUSA, as a chemical mixture?

Law and Analysis:

Classification of merchandise under the HTSUSA is governed by the General Rules of Interpretation (GRI's) taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the heading and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

In considering the appropriate classification of the food supplement tablets and capsules we note that the ingredients of all the tablets and all the capsules are essentially the same regardless of the name applied to the product. The active ingredients of each tablet, regardless of name, are the same. Similarly, the active ingredients of each capsule, regardless of name, are the same. The quantity of each ingredient is essentially the same in each tablet and, likewise, the quantity of each ingredient is essentially the same in each capsule.

All the products are finished and ready to consume. They are sold in health food stores as food or nutritional supplements. No claims regarding their therapeutic or prophylactic properties are made by the importer.

The product, sold as a food supplement under the PCM-4 label, has for certain purposes been designated OP-1 by the importer.

Since the product has the ingredients of a food supplement, is marketed as a food supplement, and there are no claims of therapeutic or prophylactic properties, we have concluded that these products should be considered food supplements. We consulted the Explanatory Notes to the Harmonized System (EN) which represents the opinion of the international classification experts. EN 21.06(B)(16) provides that "Preparations, often referred to as *food supplements*, * * *" are included in this heading.

Holding:

Food supplements in tablet and capsule form and known as Polyerga II, Polymega and PCM-4 are classifiable in subheading 2106.90.6999, HTSUSA, and are subject to a general rate of duty of 10 percent *ad valorem*.

NYRL 848458 and NYRL 864642 are hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER CONCERNING THE TARIFF CLASSIFICATION OF CERTAIN MEN'S UPPER BODY GARMENTS

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of certain men's upper body garments. Comments are invited on the correctness of the proposed ruling.

DATE: Comments must be received on or before November 18, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, DC 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W, Suite 4000, Washington DC.

FOR FURTHER INFORMATION CONTACT: Cathy Braxton, Textile Classification Branch (202) 482–7050.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act Pub.L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of certain men's upper body garments. The District Director of San Diego, California issued DD 877301 which determined that the subject men's upper body garments were classifiable as men's jackets in subheading 6201.92.2050, HTSUSA. (See Ruling Letter at Attachment A to this document).

Customs Headquarters is of the opinion that DD 877301 erroneously classified the garment at issue as men's jackets and that they are instead classifiable as men's shirts in 6205.20.2065, HTSUSA, which provides for men's other cotton shirts. The subject garments are considered to be hybrid garments since they possess characteristics found on both shirts and jackets. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), the official interpretation of the tariff at the international level are usually consulted for tariff classification purposes. However, in this instance, since the subject garments are hybrids, the EN offer no guidance in classifying the subject garments.

The *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories*, CIE 13/88, [hereinafter, *Textile Guidelines]* which are sometimes consulted for aid in classifying certain garments provides a list of features common in jackets. If a garment possesses at least three of the listed features and if the result is not unreasonable, then the garment is generally classifiable as a jacket.

The submitted sample has the general appearance of a flannel shirt. The submitted sample also has a quilted lining and pockets below the waist which are features generally associated with jackets and not shirts. The garment also contains side vents and a triangular vent at the rear bottom center of it. The *Textile Guidelines* state that a full or partial lining, pockets at or below the waist, side vents in combination with back seams, or back seams or pleats, would point to classification as a jacket. The instant garment definitely has two jacket features (pockets below the waist and the quilted lining), however, a question still remains as to whether the triangular notch located on the rear bottom of the garment is considered a vent for tariff classification purposes. This triangular notch differs from a traditional back vent which is generally found in the seam to provide relief on a stress point by enabling a garment to flex and expand. The notch on this garment does not serve any functional purpose, nor is it located at a seam. Moreover, the submitted sample has the general appearance of a flannel shirt. Therefore, the garment is classifiable as a shirt in subheading 6205.20.2065, HTSUSA, which provides for men's cotton shirts.

Customs intends to modify DD 877301 to reflect the proper classification for the men's upper body garment, as stated above. The proposed ruling modifying DD 877301 is set forth in Attachment B to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: September 30, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
San Diego, CA, August 19, 1992.

CLA–2–61:DAB:C:SD I08 877301
Category: Classification
Tariff No. 6201.92.2050

MR. GUGUN CHADHA
TOTAL RESULTS, INC.
2301 Industrial Parkway Ruling West,
Unit 8
Hayward, CA 94545

Re: The tariff classification of a man's jacket from Sri Lanka.

DEAR MR. CHADHA:

In your letter of August 8, 1992, you requested a tariff classification ruling. A sample of style No. 1100 was submitted for classification.

Style 1100 is a man's cotton woven quilted flannel jacket lined with 100% woven nylon material. The garment features a full frontal opening secured by a 6 button closure, two pockets with flaps secured by one button closure at the breast area and two on the seam pockets below the waist. Style 1100 also features long sleeves with cuffs with one button closure, side and back vents and a hemmed bottom.

The applicable subheading for the garment is 6201.92.2050, Harmonized Tariff Schedule of the United States, (HTS) which provides for men's anoraks, windbreakers and similar articles, of cotton. The rate of duty is 10% *ad valorem*.

The jacket falls into textile category 334. As a product of Sri Lanka, this merchandise is presently subject to visa requirements and quota restraints based on the International Trade Agreement.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transactions.

Your sample is being returned under separate cover.

RUDY M. CAMACHO,
District Director.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC

CLA–2 CO:R:C:T 956243 CAB
Category: Classification
Tariff No. 6205.20.2065

MR. GUGUN CHADHA
TOTAL RESULTS, INC.
2301 Industrial Parkway Ruling West,
Unit 8
Hayward, CA 94545

Re: Modification of DD 877301, dated August 19, 1992; Classification of men's upper body garment; shirt v. jacket; Heading 6201; Heading 6205; *Textile Guidelines,* CIE 13/88.

DEAR MR. CHADHA:

This ruling is in response to a request for modification of District Ruling (DD) 877301 of August 19, 1992, from the Area Director of Customs New York. Since the issuance of that ruling, Customs has reexamined the merchandise and determined that it was incorrectly classified and therefore, should be modified. Accordingly, this ruling modifies DD 877301. A sample was submitted for examination.

Facts:

The submitted sample is a men's cotton flannel hip-length upper body garment. The garment contains long sleeves with vents, button cuffs, a shirt collar, a breast patch pocket with a button means of closure, a full frontal opening with a placket and button closure, a shirt collar, a single seamless back panel, a triangular back notch at the bottom of the garment, side vents at the bottom of the garment, side-seam pockets at the waist, and a quilted nylon lining.

In DD 877301, the subject merchandise was classified by the District Director of San Diego, California, in subheading 6201.92.2050 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for men's anoraks. windbreakers and similar articles, of cotton. Since the issuance of DD 877301, the Area Director of New York has reviewed the classification and determined that it was in error. The New York Seaport believes that the garments therein are properly classifiable as men's cotton shirts in subheading 6205.20.2065, HTSUSA.

Issue:

Whether the garments were properly classified as jackets of heading 6201, HTSUSA or whether they are classifiable as shirts of Heading 6205, HTSUSA?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order.

The garments at issue are considered to be hybrid garments since they possess characteristics found on both shirts and jackets. The Explanatory Notes to the Harmonized Commodity Description and Coding System (EN), the official interpretation of the tariff at the international level are usually consulted for tariff classification purposes. However, in this instance, since the subject garments are hybrids, the EN offer no guidance in classifying the subject garments.

The *Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories,* CIE 13/88, [hereinafter, *Textile Guidelines]* which are sometimes consulted for aid in classifying certain garments provides a list of features common in jackets. If a garment possesses at least three of the listed features and if the result is not unreasonable, then the garment is generally classifiable as a jacket.

In this case, the submitted sample has the general appearance of a flannel shirt. The quilted lining and the pockets below the waist are characteristics generally associated

with jackets and not shirts. The garment also contains side vents and a triangular vent at the bottom center. The *Textile Guidelines* state that a full or partial lining, pockets at or below the waist, side vents in combination with back seams, or back vents or pleats, would be features that would point to classification as a jacket. The instant garment definitely has two jacket features (pockets below the waist and the quilted lining), there is still a question as to whether the triangular notch located on the rear bottom of the garment is considered a vent for tariff classification purposes.

Upon further examination of the subject garment, it appears that it contains a single, seamless back panel. The back notch was constructed by removing a triangular piece of fabric from the garment. This differs from a traditional back vent which is generally found in the seam to provide relief on a stress point by enabling a garment to flex and expand. The notch on this garment does not serve any functional purpose, nor is it located at a seam. Thus, the subject garment only contains two features commonly associated with a jacket. Moreover, the submitted sample has the general appearance of a flannel shirt. Therefore, the garment is classifiable as a shirt.

This determination is in accordance with Headquarters Ruling Letter (HRL) 955133, dated November 17, 1993, where Customs classified a garment similar in construction to the instant article as a shirt. The sample therein was described as "a men's cotton flannel upper body garment which reaches to about the hip area in length. The garment has an outer shell of cotton flannel fabric, long sleeves with sleeve vents and buttoned cuffs, a shirt collar, a breast patch pocket with a buttoned flap, a full front opening with a placket and button closure (typical shirt buttons), a tapered shirt silhouette, side vents at the bottom of the garment, side-seam pockets at the waist, and a quilted nylon lining." Customs provided the following rationale for the tariff classification:

> Utilizing the *Textile Guidelines*, taking into consideration the advertising material on similar garments submitted by the National Import Specialist and viewing the garment itself, this office believes that classification of the garment at issue as a shirt and not a jacket was a proper determination. In light of the numerous rulings on similar garments classified as shirts, such a result is not unreasonable.

Holding:

Based on the foregoing, the subject garment is classifiable in subheading 6205.20.2065, HTSUSA, which provides for men's other cotton shirts. The applicable rate of duty is 21 percent *ad valorem* and the textile restraint category is 340.

This notice to you should be considered a modification of DD 877301 under 19 CFR 177.9(d)(1).

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check. close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importing the merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 101 and 122

ESTABLISHMENT OF NEW PORT—ROCKFORD, ILLINOIS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations pertaining to Customs field organization by establishing a new port of entry in the Customs District of Chicago, Illinois, North Central Region. The new port of entry would be designated as Rockford, Illinois and would include Greater Rockford Airport, which is currently operated as a user-fee airport. This change will assist the Customs Service in its continuing efforts to achieve more efficient use of its personnel, facilities, and resources, and to provide better service to carriers, importers, and the general public.

DATE: Comments must be received on or before December 5, 1994.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Franklin Court, 1099 14th Street, Suite 4000, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Mr. Brad Lund, Office of Inspection and Control, (202) 927–0540.

SUPPLEMENTARY INFORMATION:

BACKGROUND

To achieve more efficient use of its personnel, facilities, and resources, and in order to provide better service to carriers, importers and the public in the North Central Region, Customs proposes to amend § 122.15, Customs Regulations (19 CFR 122.15), by removing Greater Rockford Airport from the list of user-fee airports and § 101.3, Customs Regulations (19 CFR 101.3) to add Rockford, Illinois, as a port of entry. The new port would be designated as Rockford, Illinois and would include Greater Rockford Airport.

The criteria used by Customs in determining whether to establish a port of entry are found in T.D. 82–37 (47 FR 10137), as revised by T.D. 86–14 (51 FR 4559) and T.D. 87–65 (52 FR 16328). Under these criteria, a community requesting a port of entry designation must:

(1) demonstrate that the benefits to be derived justify the Federal Government expense involved;

(2) be serviced by at least two major modes of transportation (rail, air, water or highway);

(3) have a minimum population of 300,000 within the immediate service area (approximately a 70 mile radius); and

(4) make a commitment to make optimal use of electronic data transfer capabilities to permit integration with Customs Automated Commercial System (ACS), which provides a means for electronic processing of entries of imported merchandise. Further, the actual or potential Customs workload (minimum number of transactions per year) at the proposed port of entry must meet one of several alternative minimum requirements, one of which is the condition that no more than half of the required 2,500 consumption entries can be attributable to one private party. Lastly, facilities at the proposed port of entry must include cargo and passenger facilities, warehousing space for the secure storage of imported cargo pending final Customs inspection and release, and administrative office space, inspection areas, storage areas and other space necessary for regulatory Customs operations.

The proposal set forth in this document originated as a request from the Rockford Airport Authority that Rockford, Illinois be designated as a port of entry. With regard to the above criteria, the Rockford Airport Authority has stated that the Federal Government would benefit from the port of entry designation because Rockford, Illinois would thus be available to share the workload presently handled at the port of entry at Chicago, Illinois.

According to a memorandum from the Regional Commissioner, North Central Region, in addition to the airport, Rockford has two other transportation modes, rail and highway.

According to the Rockford Chamber of Commerce, the 1990 census figures indicate that the population of the city of Rockford is 139,426 and that of the Rockford metropolitan area is stated to be 283,719. A 70 mile radius would include several Illinois and Wisconsin cities and several northwestern suburbs of Chicago. Counting the communities within a 70 mile radius would bring the area population to well over 300,000.

The number of formal Customs entries in fiscal year 1992 was 3539, with a representation that no more than 8.4% were attributable to one private party. Regarding electronic data transfer capability, the Greater Rockford Airport Authority is committed to making optimal use of electronic data transfer capability to permit integration with ACS.

Lastly, according to the Regional Commissioner's office, since Greater Rockford Airport is currently a Customs user-fee airport, it already has a workload. It is likely that Rockford will continue to grow.

The District Director at Chicago has verified that Rockford's entries for the year 1992 exceeded 2,500 formal entries, and the Regional Commissioner for the North Central Region has advised that Rockford appears to meet the criteria for port of entry status.

Based on the above, Customs believes that there is sufficient justification for the establishment of the requested port of entry. Rockford, Illinois meets an appropriate combination of the workload criteria specified.

DESCRIPTION OF PORT ENTRY LIMITS

The geographical limits of the proposed Port of Rockford, Illinois, which would include the Greater Rockford Airport, would be as follows:

> Bounded to the north by the Illinois/Wisconsin border; Bounded to the west by Illinois State Route 26; Bounded to the south by Illinois State Route 72; and Bounded to the east by Illinois State Route 23 north to the Wisconsin/Illinois border.

PROPOSED AMENDMENTS

If the proposed port of entry designation is adopted, the list of Customs regions, districts, and ports of entry at § 101.3 will be amended to include Rockford, Illinois as a port of entry in the Customs District of Chicago and the Greater Rockford Airport will be deleted from the list of user-fee airports in § 122.15.

COMMENTS

Before adopting this proposal as a final rule, consideration will be given to any written comments timely submitted to Customs. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11 (b) of the Customs Regulations (19 CFR 103.11 (b)) on regular business days between the hours of 9 a.m. and 4:30 p.m., at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 4th floor, 1099 14th St., NW., Washington, D.C. 20005.

AUTHORITY

This change is proposed under the authority of 5 U.S.C. 301 and 19 U.S.C. 2, 66, and 1624.

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Customs routinely establishes, expands, and consolidates Customs ports of entry throughout the United States to accommodate the volume of Customs-related activity in various parts of the country. Thus, although this document is being issued with notice for public comment, because it relates to agency management and organization it is not sub-

ject to the notice and public procedure requirements of 5 U.S.C. 553. Accordingly this document is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). In addition, this proposal does not meet the criteria for a §significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Regulations Branch. However, personnel from other offices participated in its development.

SAMUEL H. BANKS,
Acting Commissioner of Customs.

Approved: September 19, 1994.
JOHN P. SIMPSON,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, October 5, 1994 (59 FR 50717)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–151)

AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT AND NATIONAL CEMENT CO. OF CALIFORNIA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND, CEMEX, S.A., DEFENDANT-INTERVENOR

Consolidated Court No. 93–05–00273

[Plaintiffs' motion for judgment on the agency record granted. Defendant-intervenor's motion for judgment on the agency record granted in part, denied in part. Defendant-intervenor's motion to strike denied as moot.]

(Dated September 26, 1994)

King & Spalding (Joseph W. Dorn, Michael P. Mabile, Gregory C. Dorris and *Martin McNerney)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Robert E. Kirschman, Jr.), Terrence J. McCartin,* Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Manatt Phelps & Phillips (Irwin P. Altschuler, David R. Amerine, Ronald M. Wisla and *Claudia G. Pasche)* for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court on cross-motions for judgment on the agency record pursuant to USCIT R. 56.2. Plaintiffs, the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement and National Cement Company of California (collectively "the Committee") and defendant-intervenor, CEMEX, S.A. ("CEMEX"), challenge the results of the first administrative review of the antidumping order in *Gray Portland Cement and Clinker from Mexico,* 58 Fed. Reg. 25,803 (Dep't Comm. 1993) (final admin. review). The issues presented are whether pre-sale home market transportation costs should have been deducted in the calculation of foreign market value ("FMV"), whether the value-added tax ("VAT") adjustment was proper, whether best information available ("BIA") should have been applied to CEMEX, and whether the BIA rate chosen was proper.

BACKGROUND

On August 30, 1990, the International Trade Administration of the United States Department of Commerce ("Commerce") issued an anti-

dumping order covering entries of gray portland cement and clinker from Mexico. *Gray Portland Cement and Clinker from Mexico,* 55 Fed. Reg. 35,443 (Dep't Comm. 1990) (antidumping duty order). A margin of 58.38 percent was applied to CEMEX. *Id.*

On September 18, 1991, Commerce initiated its first administrative review of the antidumping order, covering entries from April 12, 1990 through July 31, 1991. On March 6, 1992, the Committee filed a complaint with Commerce alleging that during the review period CEMEX created fictitious home market sales within the meaning of 19 U.S.C. §§ 1677b(a)(1), (5) (1988). *See* Pls.' Conf. App., App. B.

On April 28, 1993, Commerce issued the final determination of the first review, applying a revised dumping margin of 30.44 percent for CEMEX and reaching a negative determination on the fictitious market issue. 58 Fed. Reg. at 25,803–04, 25,810.[1] On May 13, 1993, CEMEX filed an action challenging the final determination. On May 19, 1994, the Committee filed a separate action challenging Commerce's final determination as to respondent CEMEX. These actions were consolidated on June 16, 1993.

On November 30, 1993, the Committee moved for judgment on the agency record pursuant to USCIT R. 56.2. *See* USCIT R. 56.2. On April 18, 1994, CEMEX cross-moved for judgment on the agency record.[2] On the same date, CEMEX also moved to strike certain sections of the Committee's brief relating to the Committee's fictitious market argument.

The Committee had initially raised four arguments in its motion for judgment on the agency record: a/ CEMEX created a fictitious market; b/ Commerce erred in calculating CEMEX's cost of production by offsetting CEMEX's interest expense with a hypothetical monetary position gain; c/ Commerce erred in calculating FMV by deducting CEMEX's pre-sale home market transportation expenses; and d/ Commerce erred in adjusting for VAT by adding an absolute tax to the United States Price ("USP").[3]

The Committee has withdrawn its fictitious market and monetary position gain arguments as a result of Commerce's second review, *Gray Portland Cement and Clinker from Mexico,* 58 Fed. Reg. 47,253, 47,255 (Dep't Comm. 1993) (final) (excluding CEMEX's home market sales of Type II cement from calculation of FMV because outside ordinary

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[1] After correction for clerical errors, the margin increased to 40.72 percent. *Gray Portland Cement and Clinker from Mexico,* 58 Fed. Reg. 49,471 (Dep't Comm. 1993) (amended final admin. review).

[2] CEMEX's brief is entitled "Memorandum in Support of Points Raised in [its] Complaint," but is properly considered a motion for judgment on the agency record.

[3] USP, exporter's sales price ("ESP") and purchase price ("PP") are defined at 19 U.S.C. § 1677a (1988):

(a) United States price

* * * [T]he term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.

(b) Purchase price

* * * "[P]urchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.

(c) Exporter's sales price

* * * "[E]xporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *."

course of trade), and the Federal Circuit's holding in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 13 F.3d 398 (Fed. Cir. 1994) (finding no inherent authority for ITA to deduct pre-sale home market transportation expenses from FMV).[4] Thus the remaining issues presented by the Committee are: a/ the limits on deduction of home market pre-sale transportation costs following *Ad Hoc*, and b/ VAT adjustment.[5]

CEMEX raises two arguments in its motion for judgment on the agency record: a/ Commerce erred in applying adverse BIA to the reclassified ESP sales, and b/ Commerce improperly applied BIA in calculating added materials costs for further manufactured concrete products.

STANDARD OF REVIEW

On a motion for judgment on the agency record, the scope of review of Commerce's determination is whether it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

DISCUSSION

A. *Deduction of Pre-sale Home Market Transportation Expenses:*

As provided under 19 U.S.C. § 1677b(a)(4)(B),

> [i]n determining [FMV], if it is established to the satisfaction of the administering authority that the amount of any difference between the [USP] and the [FMV] (or that the fact that the [USP] is the same as the [FMV]) is wholly or partly due to—
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> * * * * * * *
>
> (B) other differences in circumstances of sale; * * *
>
> * * * * * * *
>
> then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4)(B) (1988). Commerce's implementing regulation generally requires a direct relationship between the expenses and the particular sales at issue before FMV may be adjusted. 19 C.F.R. § 353.56(a) (1993). For ESP comparisons, a circumstances of sale ("COS") adjustment is permitted for indirect expenses. *Id.* § 353.56(b)(2); *see Consumer Prods. Div. v. Silver Reed America. Inc.*, 753 F.2d 1033, 1035–36 (Fed. Cir. 1985).[6] The regulation also provides for an ESP offset cap that, for ESP comparison purposes, caps the COS adjustment for indirect expenses at the level of indirect expenses incurred in the United States market. 19 C.F.R. § 353.56(b)(2).

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[4] As the fictitious market argument has been withdrawn, CEMEX's motion to strike is denied as moot.

[5] All parties agree that the court should remand the case to Commerce for reconsideration of Commerce's treatment of CEMEX's pre-sale home market transportation costs and recalculation for VAT adjustment, but disagree as to the instructions for reconsideration. *See* Pls.' Reply Br. Supp. Mot. J. Agency R. at 2; Def.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 16–17; Def.-Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 21, 28.

[6] *Silver Reed* discusses an earlier version of 19 C.F.R. § 353.56(b)(2). *See* 19 C.F.R. § 353.15(c) (1985).

The court first considers the Committee's claim that Commerce improperly deducted pre-sale home market transportation expenses[7] in calculating FMV. The Committee argues that the Federal Circuit's holding in *Ad Hoc* precludes Commerce from deducting any pre-sale home market transportation costs in calculating FMV for PP or ESP comparisons. Commerce responds that a remand is required for it to conform its analysis to the holding of *Ad Hoc,* but also that *Ad Hoc* does not prohibit Commerce from invoking the COS provision contained in 19 U.S.C. § 1677b(a)(4) to deduct pre-sale home market transportation costs from FMV. CEMEX supports Commerce's view.

The Federal Circuit in *Ad Hoc* presented the issue on review as: "[W]hether the [FMV] provision of the antidumping statute, 19 U.S.C. § 1677b, authorizes a deduction from [FMV] of pre-sale transportation costs within the exporting country for goods sold within that country." *Ad Hoc,* 13 F.3d at 400. In *Ad Hoc,* Commerce had deducted pre-sale home market transportation costs from FMV in a purchase price ("PP") comparison pursuant to its "inherent authority" to fill "gaps" in the antidumping statute. *Id.* at 400–01. The Federal Circuit stated, "That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV." *Id.* at 402.

This is admittedly a broad statement, but recently in *Torrington Co. v. United States,* 850 F. Supp. 7 (Ct. Int'l Trade 1994), the court concluded that *Ad Hoc* only applies to calculation of FMV in PP comparisons (where the distinction between direct and indirect expenses is most relevant).[8] 850 F. Supp. at 10. The *Torrington* court further stated that the *Ad Hoc* court "specifically noted that it was not ruling on whether the ITA has authority to adjust FMV for pre-sale inland freight pursuant to the [COS] provision." *Id.* The *Torrington* court, however, did not consider whether Commerce may make such a deduction for PP comparison purposes under the COS provision. In the present case, the Committee argues that the *Torrington* court misinterpreted the holding in *Ad Hoc* and that the COS provision is not applicable.

This court cannot accept so broad an interpretation of the Federal Circuit's holding in *Ad Hoc* as the Committee would have. As noted in *Torrington,* 850 F. Supp. at 10, the Federal Circuit in *Ad Hoc* stated that "[a]lthough intervenors urge that we affirm the Court of International Trade judgment under the 'circumstances of sale' provision, we decline the invitation. It is well settled that an agency's action may not be upheld on grounds other than those relied on by the agency." *Ad Hoc,* 13 F.3d at 401 n.8 (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947)).

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[7] During the first review period, CEMEX incurred certain freight expenses in shipping cement from its home plants to home market distribution terminals, where the cement was stored prior to sale.

[8] As indicated, indirect sales expenses are deducted from FMV for ESP comparisons, but not for PP comparisons. *See supra* discussion pp. 6–7. While ESP transactions were present in the proceedings underlying the *Ad Hoc* litigation, the Court of Appeals indicated that ESP methodology was not at issue on appeal. *See Ad Hoc,* 13 F.3d at 399 n.2. ("In this case, Commerce used the purchase price approach.")

Thus, the *Ad Hoc* court did not address the applicability of the COS provision to home market transportation costs in the calculation of FMV.

Furthermore, to apply *Ad Hoc* more broadly, that is, to both ESP and PP COS adjustments and perhaps to post-sale transportation expenses, as full application of the *Ad Hoc* rationale might,[9] would disregard Commerce's longstanding practice of deducting home market transportation costs under the COS provision.[10] This is a practice to which Congress has apparently acquiesced.[11] If, despite prior practice and Congressional inaction, the *Ad Hoc* court had intended to prohibit Commerce from deducting any home market transportation costs in calculating FMV for both ESP and PP comparisons, it would have made this intent clear. Instead, the court discussed, without disapproval, Commerce's ESP-COS procedures where, as indicated, indirect expenses, such as most pre-sale transportation costs, are deductible from FMV to the extent of the USP level of expenses. *See Ad Hoc,* 13 F.3d at 400; 19 C.F.R. § 353.56(b)(2). Therefore, the *Ad Hoc* court's conclusion can only be read properly in the context of the narrow question before it, that is, without a determination as to whether they are directly related to sales, may pre-sale transportation costs be deducted from FMV in the context of PP comparisons. *Ad Hoc's* answer to that question is "No."

In other post-*Ad Hoc* cases treating pre-sale home market transportation expenses, where Commerce had not conducted a COS analysis, the court has remanded the case to Commerce with instructions to determine whether ITA had the statutory authority to deduct the transportation expenses from FMV in PP comparisons. *E.g., Torrington,* 850 F. Supp. at 10, 12; *Federal-Mogul Corp. v. United States,* Slip Op. 94–40, at 8 (Mar. 7, 1994); *Timken Co. v. United States,* Slip Op. 94–41, at 5–6 (Mar. 7, 1994). Commerce has now fully analyzed this issue and applied COS methodologies in the PP context following remand of *Ad Hoc*. The court agrees that the statute, as well as *Ad Hoc,* leaves Commerce free to apply its COS methodology to pre-sale transportation costs in the PP context. *See supra* discussion of 19 U.S.C. § 1677(b), prior practice and legislative history.

The court now turns to the application of COS analysis to the facts of record here. In the present case, eleven of CEMEX's sales at issue are

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[9] As indicated, *see supra* p. 8, the *Ad Hoc* decision relied upon the provision for deduction of transportation costs from USP, and the lack of such language on the FMV side, *compare* 19 U.S.C. §§ 1677b(a)(1), (4) *with* 19 U.S.C. § 1677a(d)(2)(A) (1988), but the court notes there is also no language concerning post-sale transportation costs on the FMV side. *See Ad Hoc,* 13 F.3d at 399 n.3, 401–02.

[10] *See, e.g., Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany,* 54 Fed. Reg. 18,992, 19,046 (Dep't Comm. 1989) (final determs. of less than fair value ("LTFV") sales); *Butadiene Acrylonitrile Copolymer Synthetic Rubber from Japan,* 53 Fed. Reg. 15,436, 15,438 (Dep't Comm. 1988) (final determ. of LTFV sales); *Color Television Receivers from Korea,* 53 Fed. Reg. 24,975, 24,988 (Dep't Comm. 1988) (final).

[11] Although Congress amended the antidumping statute in 1979, 1984 and 1988, no changes were made to the COS provision, at least arguably signalling congressional approval of Commerce's application of the COS provision to deduct home market transportation costs in calculating FMV. *See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969) (stating agency construction of statute should be given great weight, especially when "Congress has refused to alter the administrative construction").

classified as ESP sales.[12] All parties have agreed from the outset that the pre-sale home market transportation costs may be deducted as indirect expenses under the COS provision for ESP sales comparisons (although the Committee also argues, somewhat inconsistently, that the holding in *Ad Hoc* now prevents this). *See* discussion *supra*.

For those sales classified as PP transactions,[13] the issue is whether the pre-sale home market transportation expenses are direct expenses, and thus may be deducted in calculation of FMV. CEMEX asserts that the pre-sale home market transportation expenses are tied directly to the PP sales at issue,[14] and are properly deducted from FMV under the COS provision. The regulations, however, do not provide any guidance in determining what constitutes "direct" expenses.[15] Furthermore, the case law to date has not specifically addressed deduction of pre-sale home market transportation expenses as direct or indirect expenses under the COS provision. On remand Commerce shall address this issue.[16]

In sum, as *Ad Hoc* held, Commerce does not have the "inherent authority" to deduct pre-sale home market transportation expenses in the calculation of FMV. Instead, the statute permits such expenses to be deducted as indirect expenses under the COS provision for ESP comparisons, subject to the ESP offset cap. For PP comparisons these expenses may be deducted from FMV under the COS provision if the expenses are determined to be directly related to the sales at issue. Therefore, the court remands this issue for Commerce to determine to what extent the pre-sale home market transportation costs at issue may be deducted as a COS adjustment in calculation of FMV.

B. *VAT Adjustment:*

The Committee challenges whether Commerce's treatment of the Mexican VAT in this case was appropriate. The Committee argues that the court should remand the issue to Commerce to adjust USP by the VAT amount that would have been collected on the merchandise if the sales were home market sales. Commerce concedes that in *Federal-Mogul Corp. v. United States*, 834 F. Supp. 1391, 1396 (Ct. Int'l Trade 1993),

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[12] Initially, Commerce had contended that CEMEX misclassified 14 ESP sales as PP transactions. Commerce now acknowledges that three of the 14 U.S. sales at issue were correctly classified by CEMEX as PP sales. These three sales are recorded on invoice numbers CA–1588, CA–1590 and CA–1596. Commerce requests a remand to make the appropriate corrections. Def.'s Mem. Opp'n Def.-Int.'s Mot. J. Agency R. at 10 n.10. CEMEX does not oppose Commerce's request.

[13] *See supra* note 12.

[14] CEMEX reported plant-by-plant freight factors on a peso per kilogram basis. CEMEX maintains that since all types of hydraulic cement are subject to the same freight rates from each plant, CEMEX's reported freight expenses are attributable solely to merchandise subject to the sales order, and can therefore be directly linked to the ESP sales at issue. Def.-Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 26.

[15] CEMEX's citation to the legislative history of amendments to the original antidumping statute in *Antidumping: Hearings on H.R. 6006 Before the Senate Comm. on Finance*, 85th Cong., 2d Sess. 19 (1958) (explanatory mem. of Treasury Dep't), does not offer further clarification. *See* Def.-Int.'s Mem. Opp'n Pls.1 Mot. J. Agency R. at 27–28.

[16] The court has considered whether pre-sale warehousing costs may fall under the COS provision. *See, e.g., Asahi Chem. Indus. v. United States*, 12 CIT 690, 693–94, 692 F. Supp. 1376, 1379 (1988) (finding pre-sale warehousing charges incurred in home market may merit COS adjustment); *NTN Bearing Corp. v. United States*, 14 CIT 623, 641, 747 F. Supp. 726, 741–42 (1990) (holding pre-sale warehousing costs may be directly related to sales under consideration and thus warrant COS adjustment). *But see LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 457–58 (Fed. Cir. 1990) (affirming ITA determination that pre-sale warehousing costs were not attributable solely to home market sales, and thus not directly related).

the court rejected the manner in which Commerce had been interpreting *Zenith Elecs. Corp. v. United States,* 988 F.2d 1573, 1582 n.4 (Fed. Cir. 1993), when making a VAT adjustment. Commerce thus agrees that the court should remand this case for VAT adjustment, as does CEMEX. The court further instructs Commerce that it shall apply its new VAT methodology as approved in *Torrington Co. v. United States,* 853 F. Supp. 446, 448–49 (Ct. Int'l Trade 1994).

C. *Applicability of Adverse BIA to Reclassified ESP Sales:*

CEMEX contests both Commerce's application of BIA for reclassified ESP sales and the specific rate chosen. CEMEX argues that the case should be remanded for Commerce to request from CEMEX indirect selling expense information on the reclassified ESP sales. Commerce maintains that because it did not have adequate information upon which to determine the appropriate adjustments on the ESP sales, it was justified in using BIA as the basis for the deductions required by 19 U.S.C. § 1677a(e) (1988). The Committee supports Commerce's view.

Congress has mandated that Commerce "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. § 1677e(c) (1988). Similarly, the regulations provide for the use of BIA when Commerce "(1) [d]oes not receive a complete, accurate and timely response to * * * [a] request for factual information; or (2) [i]s unable to verify, within the time specified, the accuracy and completeness of the factual information submitted." 19 C.F.R. § 353.37(a) (1993). Commerce lacks subpoena power, but the BIA provision is a means of obtaining compliance with Commerce's requests for information. *See Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Commerce's initial questionnaire in the administrative review requested that CEMEX report its United States sales and identify each as a PP sale or an ESP transaction. The questionnaire clearly indicated, consistent with the definitions provided in 19 U.S.C. § 1677a(b)–(c), the distinction between PP sales and ESP sales.[17] Upon learning that CEMEX had misclassified 11 ESP sales as PP transactions,[18] Commerce requested that CEMEX submit documentation to verify the entry dates of the questioned sales.[19] Along with the verification information requested by Commerce, CEMEX proffered additional information that had not been requested. The additional information provided Commerce with data to calculate indirect selling expenses for the sales that

[17] The questionnaire defined PP sales as "[s]ales to an unrelated buyer for export to the United States, with dates prior to the date on which the merchandise was imported into the United States." *See* App. Pls.' Reply Br. Supp. Mot. J. Agency R. and Br. Resp. Issues Raised Def.-Int. App. E, at C–1. The questionnaire defined ESP sales as "[s]ales made to an unrelated buyer for the U.S. market after the date on which the merchandise was imported into the United States." *Id.* App. E, at C–2.

[18] *See supra* note 12.

[19] Commerce requested that CEMEX submit "any U.S. Customs documentation (e.g., Form 7501) which would indicate the date of entry" for each of the 14 sales at issue. *See* Conf. App. Def.Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. App. N (Commerce Apr. 15, 1993 letter to CEMEX).

CEMEX had misclassified. Commerce rejected the additional information and instead applied BIA in the calculation of USP for the reclassified ESP sales.

CEMEX claims that the use of BIA was improper in this case for three reasons: a/ Commerce had no basis to reclassify any of the reported PP sales; b/ Commerce was required to request or give CEMEX the opportunity to provide the necessary indirect selling expense information; and c/ Commerce should have used "neutral" information rather than adverse BIA.

This court cannot accept CEMEX's argument that Commerce had no basis to reclassify the reported PP sales. CEMEX contends that Commerce's reclassification of the 11 sales was improper because the date of sale of the reclassified sales preceded their date of entry. CEMEX points to an earlier ruling made by Commerce in the original investigation stating that Commerce "consider[ed] the date of shipment to be the date of sale." *Gray Portland Cement and Clinker from Mexico,* 55 Fed. Reg. 29,244, 29,248 (final determ. of LTFV sales). CEMEX argues that it relied upon this classification of the "date of sale" when preparing its response to Commerce's questionnaire. CEMEX, however, overlooked Commerce's explicit definitions of PP sales and ESP sales contained in the questionnaire. Moreover, CEMEX misinterprets Commerce's ruling in the original investigation, because Commerce limited its "date of sale" holding to a small class of United States sales, i.e., sales made pursuant to a long-term contract, and a subsequent "letter agreement." *Id.* There is no evidence in the record showing that the sales at issue fall within this narrow class of United States sales.

CEMEX's second argument, that Commerce was required to request or give CEMEX the opportunity to provide the necessary information, also fails. As indicated, CEMEX asserts that Commerce inappropriately resorted to BIA and that the case should be remanded directing Commerce to request indirect selling expense data from CEMEX. CEMEX insists that only a refusal to comply with an information request justifies a resort to BIA. The court finds CEMEX's reliance upon *Olympic Adhesives Inc. v. United States,* 899 F.2d 1565 (Fed. Cir. 1990), *Daewoo Elecs. Co. v. United States,* 13 CIT 253, 712 F. Supp. 931 (1989), *aff'd in part and rev'd in part,* 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied,* 114 S. Ct. 2672 (1994), and *Outokumpu Copper Rolled Prods. AB v. United States,* 829 F. Supp. 1371 (Ct. Int'l Trade 1993), is misplaced.

In *Olympic Adhesives,* Commerce had resorted to BIA because it claimed that respondent through its questionnaire response failed to provide information that "unequivocally negated or established the allegation that the home market sales were fictitious." 899 F.2d at 1574. There the court held that Commerce "may not properly conclude that resort to the best information rule is justified in circumstances where a questionnaire is sent and completely answered, just because the ITA concludes that the answers do not definitely resolve the overall issue presented." *Id.*

Further, in *Daewoo,* Commerce had not "follow[ed] the regular procedure of providing a questionnaire containing the appropriate instructions needed to compile the required information." 13 CIT at 265, 712 F. Supp. at 944. Commerce chose not to use some of the calculations incorrectly reported by the respondent. *Id.* Thus the *Daewoo* court concluded that Commerce had improperly resorted to BIA because the inaccurate responses were a result of "[Commerce's] own failure to provide instructions as to the methods of compiling the information." *Id.* at 266, 712 F. Supp. at 945.

Lastly, Commerce's questionnaire in *Outokumpu* provided: "'[B]e aware that if we do not agree with your preference for comparison, at a later date we will have to request information on cost differences for items we select for comparison.'" 829 F. Supp. at 1375–76. The *Outokumpu* respondents provided in their questionnaire several model matches between merchandise sold in the United States and in the home market, and included difference-in-merchandise data for their reported comparisons only. *Id.* at 1376. Petitioners claimed that Commerce erred when it failed to use BIA for missing difference-in-merchandise data. Commerce, however, had never requested further information on the comparisons it selected. *Id.* The *Outokumpu* court thus found that Commerce's decision not to resort to BIA was appropriate. *Id.* at 1377.

In the present case, unlike the facts in *Olympic Adhesives, Daewoo* and *Outokumpu,* the data was not missing because Commerce had failed to make an appropriate request for it, but rather because CEMEX misclassified the data in its submission. Thus, Commerce acted reasonably in resorting to BIA for the missing data. Further, CEMEX submission of the correct indirect selling expense data to Commerce was untimely—after verification and two weeks before the final results were issued—thus preventing Commerce from verifying the information. Pursuant to 19 C.F.R. § 353.37(a), Commerce was justified in rejecting the data submitted untimely and in resorting to BIA. *See, e.g., Mantex, Inc. v. United States,* 841 F. Supp. 1290, 1309–10 (Ct. Int'l Trade 1993); *Chinsung Indus. Co. v. United States,* 13 CIT 103, 105–07, 705 F. Supp. 598, 600–02 (1989).

The final argument to be addressed is whether Commerce should have used "neutral" information because Commerce classified CEMEX as "essentially * * * a cooperative respondent." 58 Fed. Reg. at 25,808. CEMEX maintains that if the court determines Commerce's use of BIA was proper, Commerce should have used "neutral" information.[20] Commerce used as BIA the weighted-average of all of the ESP adjustments for the ESP sales properly reported by CEMEX.

CEMEX misunderstands Commerce's BIA methodology as well as the general purpose of the BIA provision. Commerce applies either "partial

[20] CEMEX claims that Commerce should have used the weighted average of the indirect selling expenses reported by CEMEX as BIA. *See* Def.-Int.'s Mem. Opp'n Pls.' Mot. J. Agency R. at 38.

BIA" or "total BIA."[21] Regardless of the type of BIA used, Commerce does not apply a "neutral" figure as BIA except in very unusual situations for which a respondent should not be penalized.[22] The purpose of the BIA provision is to induce respondents to provide Commerce with timely, complete and accurate information so that Commerce can determine dumping margins as accurately as possible. *Rhone Poulenc,* 899 F.2d at 1190–91. To accept CEMEX's contention that "neutral" information should have been applied in this case where CEMEX misclassified its sales would undermine the purpose of the BIA provision, and would allow a respondent to pick and choose among its data, a practice not permitted.

Although Commerce's application of adverse BIA in this case was appropriate, Commerce requests that the court remand the case for correction of selection of adverse BIA. Commerce asserts that the use as BIA of the weighted-average of all the ESP adjustments to ESP sales properly reported by CEMEX resulted in Commerce, (a) not using actual expense data timely reported by CEMEX for certain ESP adjustments for these ESP sales, and (b) including certain adjustments that could not have been applicable to these ESP sales. *See* Def.'s Mem. Opp'n Def.-Int.'s Mot. J. Agency R. at 19. CEMEX argues that Commerce: a/ disregarded verified price adjustment information pertaining to the reclassified sales, and b/ included unrelated expenses in BIA applied to the reclassified sales. *See* Def.-Int.'s Mem. Supp. Points Raised Def.-Int.'s Compl. at 41, 43. As the request made by Commerce to correct its selection of BIA is consistent with CEMEX's claim, the court remands this issue for Commerce to reconsider what corrections are appropriate.

D. *Application of Adverse BIA for Added Materials Costs:*

CEMEX reasserts the argument that because Commerce labeled CEMEX a "cooperative" respondent, Commerce should have used "neutral" information instead of adverse BIA for added materials costs. CEMEX further contends that if adverse BIA was to be used, Commerce should have used as BIA the highest individually reported added materials costs *per cubic yard of concrete,* while applying the specific conver-

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[21] Under Commerce's BIA methodology, there are two general types of BIA: "total BIA" and "partial BIA." For "total BIA" the respondent's entire dumping margin is calculated upon the basis of BIA. Commerce uses "total BIA" for a respondent whose reporting or verification failure is so extensive as to make its entire response unreliable. Commerce's choice of a particular BIA rate is dependent upon whether the respondent is deemed to have been "cooperative" or "uncooperative." Commerce will use the highest possible BIA rate for an "uncooperative" respondent.

Commerce applies "partial BIA" when a respondent's submitted information is deficient in limited respects, yet is still reliable in most other respects. In a "partial BIA" situation, Commerce alleges it does not consider the level of cooperation of the respondent.

[22] In a "partial BIA" situation the only instance in which BIA is not adverse is when there is an inadvertent gap in the record, *e.g., Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada,* 58 Fed. Reg. 15,481, 15,482–83 (Dep't Comm. 1993) (final), when only a minor or insignificant adjustment is involved, *e.g., Brass Sheet and Strip from West Germany,* 55 Fed. Reg. 28,264, 28,265 (Dep't Comm. 1990) (preliminary results), or when the missing data is beyond the control of the respondent. *See, e.g., Holmes Prods. Corp. v. United States,* 16 CIT 628, 629–31, 795 F. Supp. 1205, 1206–07 (1992) (requiring ITA to use respondent's data because respondent was found by ITA to be in substantial compliance and could not control conduct of uncooperative affiliate).

sion factor[23] reported by CEMEX on a product-by-product basis, to arrive at the added materials costs *per cement ton*. Specifically, CEMEX argues that Commerce should be required to use CEMEX's data that was later verified, and should limit its use of BIA to the one component of the added materials costs that CEMEX did not report.[24] CEMEX maintains that this measure "would reasonably reflect the actual costs of added materials." Def.-Int.'s Mem. Supp. Points Raised Def.Int.'s Compl. at 47. Commerce argues that it was within its discretion in selecting "partial BIA" to apply the highest information reported by CEMEX for other products in place of the information not reported.

In calculating the value-added adjustment to ESP for CEMEX's further manufactured sales through Sunward Materials, Commerce did not accept any of the average added materials costs CEMEX supplied. Commerce instead used BIA for the necessary added materials cost adjustments. For the phoenix division, BIA was based upon the highest individually calculated added materials cost per cement ton, for any product made at the division for which CEMEX had properly reported product-specific costs. For the Tucson Division, Commerce followed the same approach. 58 Fed. Reg. at 25,809.

As previously discussed, in the "partial BIA" context, "neutral" BIA is applied only to a respondent who has substantially complied and there is also an inadvertent or unavoidable gap in the record, or when a minor or insignificant adjustment is involved. *See supra* note 22. In the present case, CEMEX failed to provide actual added materials cost data and the adjustments at issue were significant.

CEMEX asserts that, at least, Commerce should have used the highest available data on costs per yard of concrete, multiplied by the product-specific conversion factor supplied. Commerce instead filled in missing added materials cost data in "per cement ton" terms by taking CEMEX's highest end result for added materials costs, yielding a higher BIA rate than would result from the approach advocated by CEMEX. Commerce has previously applied this method to other products. *See, e.g., Pressure Sensitive Plastic Tape from Italy,* 54 Fed. Reg. 13,091, 13,092 (Dep't Comm. 1989) (final).

CEMEX asserts, however, that here this results in a margin of over 1000% for the products involved because of the wide variation in the amount of cement used in particular products. While Commerce may use "adverse" BIA here, the result of Commerce's selection may be needlessly distortive. Accordingly, this matter will be remanded to

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[23] All concrete costs and sales are recorded in CEMEX's accounting records in terms of dollars *per cubic yard of concrete*. All cement sales by CEMEX and the adjustments and factors in CEMEX's computer tape are reported in terms of dollars *per ton of cement*. CEMEX's questionnaire response to Commerce included a column in the computer tape, "BLKCONVE," that provided the conversion factor necessary to convert information reported on the basis of dollars per cubic yard of concrete to a dollars per ton of cement basis, for each product.

[24] For approximately 18% of CEMEX's further manufactured concrete products manufactured by its U.S. subsidiary, Sunward Materials, Inc. (through its Phoenix and Tucson divisions), all elements except direct materials were fully costed. For these products, CEMEX reported an average added materials cost and a specific conversion factor.

determine if the method recommended by CEMEX would result in a sufficiently adverse, but non-distortive, BIA choice.[25]

CONCLUSION

Commerce's methodology for determining FMV in this case is not in accordance with law. Thus, the court remands the case for Commerce to consider CEMEX's claimed deductions for its pre-sale home market transportation costs under the COS provision. Also, Commerce's methodology for determining the VAT adjustment in this case is not in accordance with law. Accordingly, the court remands the case directing Commerce to apply its new VAT adjustment methodology. Commerce's decision to use adverse BIA for the reclassified sales and added materials costs is supported by substantial evidence in the record and is otherwise in accordance with law, but Commerce shall reconsider its selection of particular BIA data for both the reclassified sales and added materials costs.

Remand results are due within forty-five days. Objections are due twenty days thereafter. Responses may be filed twelve days later.

(Slip Op. 94–152)

AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND APASCO, S.A. DE C.V. AND CEMEX, S.A., DEFENDANT-INTERVENORS

Court No. 90–10–00508

[ITA determination sustained.]

(Dated September 26, 1994)

King & Spalding (Joseph W. Dorn, Martin M. McNerney and *Michael P. Mabile)* for plaintiff.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(A. David Lafer), Terrence J. McCartin,* Attorney Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Manatt Phelps & Phillips (Irwin P. Altschuler, David R. Amerine, Ronald M. Wisla) for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter is before the court for decision following a remand determination. Remand was ordered as a result of an appellate decision in this case. *See Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* 13 F.3d 398 (Fed. Cir. 1994)

[25] CEMEX suggests that verified total material cost information proves that the BIA chosen was unduly distorted. On remand, ITA may wish to refer to such data as a check on its selection.

("Ad Hoc I") (rejecting ITA rationale for deduction of pre-sale home market transportation costs from fair market value ("FMV") for purpose of antidumping comparison). Upon remand, the Department of Commerce applied its previous circumstance of sale ("COS") adjustment methodology for purposes of comparison of FMV to both exporter sales price and purchase price sales. *See* 19 C.F.R. 353.56 (1994).[1] Thus, in accordance with past practice, pre-sale transportation expenses were allowed as an indirect selling expense for ESP comparison purposes. Further, because the pre-sale transportation expenses were not found to be directly related to sales, the expenses were treated as indirect selling expenses in the PP context.

In the present case, plaintiff does not object to the result reached by ITC, but rather challenges its reasoning. Specifically, plaintiff contests Commerce's contention that presale transportation expenses may be deducted from FMV as a COS adjustment if the respondent can show a direct relationship to sales under review. After consideration of *Ad Hoc I,* however, this basic methodology was approved by the court in the review of a later administrative proceeding. *See Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* Slip. Op. 94–151, at 9–10 (Sept. 26, 1994) *("Ad Hoc II").* For the reasons stated in *Ad Hoc II,* the court rejects plaintiff's argument.

CEMEX contends that Commerce erred when it failed to find CEMEX's pre-sale transportation costs directly related to sales, and thus in failing to deduct these costs from FMV for PP comparison purposes. CEMEX argues that the transportation costs at issue were those related to moving cement to warehouses that were specifically for facilitating sales transactions. Nevertheless, the court concurs with Commerce that CEMEX has not demonstrated that this particular pre-sale expense is directly related to sales. specifically, the court agrees that if the pre-sale warehousing expense in this case is not shown to be a direct expense, then it follows that the cost of transporting the cement to the warehouse is also not shown to be a direct expense.

The result reached by Commerce in this case would have been the same whether the *Ad Hoc I* court intended Commerce to engage in this inquiry for pre-sale transportation expenses in PP comparisons in this specific proceeding, or whether it intended, for fairness or efficiency reasons, to preclude the reexamination of this deduction to FMV according to COS methodology. The deduction was disallowed for PP comparisons here, and the result is consistent with either reading of *Ad Hoc I.* As indicated in *Ad Hoc II, Ad Hoc I* did not address Commerce's standard ESP methodology, except to note its existence. *Ad Hoc II,* Slip Op. 94–151, at 9–10. As the ESP issue was not before the appellate court, Commerce

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[1] United States Price ("USP"), purchase price ("PP") and exporter's sales price ("ESP") are defined at 19 U.S.C. § 1677a (1988). USP means "the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate." *Id.* § 1677a(a). PP is defined as "the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States." *Id.* § 1677a(b). ESP is defined as "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter." *Id.* § 1677a(c).

was not required to address such transactions at all on remand. As no one objected to such activity on remand, there is no reason to review Commerce's reversion to its previous treatment of FMV in the ESP context. Accordingly, for pre-sale transportation expenses, the remand determination allowing an ESP indirect sales expense COS adjustment to FMV, and disallowing a PP direct sales expense COS adjustment to FMV is sustained.

(Slip Op. 94–153)

FORMER EMPLOYEES OF BELL HELICOPTER TEXTRON, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 93–01–00024

(Dated September 26, 1994.

JUDGMENT

MUSGRAVE, *Judge:* Upon consideration of Plaintiff's Rule 56.1 Motion for Judgment upon the Agency Record, Defendant's Memorandum in Opposition thereto, the record and the supplemental remand record, and other pertinent papers, it is hereby

ORDERED that the Department of Labor's *Notice of Negative Determination Regarding Eligibility To Apply For Worker Adjustment Assistance,* 58 Fed. Reg. 4186 (1993), as supplemented upon remand, with respect to workers and former workers of Bell Helicopter, Fort Worth, Texas, is sustained in its entirety, and it is further

ORDERED that this action is dismissed.

(Slip Op. 94–154)

TOTES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 91–06–00423 (BN)

[Plaintiff's motion for summary judgment denied; defendant's cross-motion for summary judgment dismissing the action is granted.]

(Dated September 30, 1994)

Appearances:

Attorneys for plaintiff:

Neville, Peterson & Williams (John M. Peterson and *Peter J. Allen,* Esqs.) 80 Broad Street, New York, N.Y. 10004, (212) 635–2730.

Attorneys for defendant:

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office *(John J. Mahon,* Esq.), United States Department of Justice, Civil Division. 26 Federal Plaza, New York, N.Y. 10278, (212) 264–9230.

OPINION AND ORDER

INTRODUCTION

NEWMAN, *Senior Judge:* Totes, Incorporated ("Totes" or "plaintiff") imported certain merchandise from Hong Kong at the port of Seattle, Washington in November 1990 known as the "Totes Trunk Organizer," style No. 3430R ("trunk organizer"). Plaintiff brings this "test case" *(see* Slip Op. 92–133) challenging the tariff classification of its trunk organizer by the United States Customs Service ("Customs") upon liquidation of the entries.

Jurisdiction rests on 28 U.S.C. § 1581(a), and consequently, this action is before the court for *de novo* review. 28 U.S.C. § 2640(a)(1). Currently, *sub judice* are cross-motions for summary judgment pursuant to CIT Rule 56. For the reasons stated hereinafter, plaintiff's motion for summary judgment is denied; defendant's cross-motion for summary judgment of dismissal is granted.

In liquidation of the subject entries, the merchandise was classified by Customs under subheading 4202.92.9020, Harmonized Tariff Schedule of the United States (1990) ("HTSUS"), *infra,* and assessed the schedule rate of 20 per centum ad valorem.

The HTSUS provisions relevant to the classification of the merchandise by Customs read (emphasis added)

> Trunks, suitcases, vanity cases, attache cases, brief cases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and *similar containers;* travelling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and *similar containers,* of leather or of composition leather, or plastic sheeting, of textile materials, of vulcanized fiber or of paper board, or wholly or mainly covered with such materials:

* * * * * * *

Other .....

* * * * * * *

With outer surface of plastic sheeting or of textile materials:

* * * * * * *

Other

* * * * * * *

Other:

With outer surfaces of textile materials

* * * * * * *

Other:

Of man-made fibers 20%

Conceding that the trunk organizers are not described *eo nomine* by any of the exemplars listed in Heading 4202, Customs classified the imports as "similar containers" by application of *ejusdem generis*, a well established rule of statutory construction, positing that the trunk organizers are of the same class or kind of containers as the listed exemplars, particularly tool bags.

Totes maintains that the trunk organizers are not similar to tool bags in particular, or even of the same class or kind as the exemplar containers in Heading 4202. Therefore, claims plaintiff, Customs' inclusion of the imports in "similar containers" predicated on *ejusdem generis* is erroneous. It is further contended that the trunk organizers are used solely or principally in motor vehicles for the storage of tools and supplies normally stored in the trunk, and hence, the merchandise, not being more specifically provided for elsewhere in the tariff, is properly dutiable at the rate of 3.1 percent ad valorem under the provision in HTSUS subheading 8708.99.50 for "Other" parts and accessories of motor vehicles of headings 8701 to 8705. Alternatively, Totes advances the claimed classification that the merchandise is dutiable under HTSUS subheading 6307.90.9986, as "Other" made up articles of textiles.

THE FACTS

In support of their respective cross-motions, the parties have stipulated and agreed upon a statement of undisputed material facts as to the composition, design, marketing and intended uses of the imports. Further, a representative sample of the merchandise (as depicted in the Appendix), the box in which it is marketed at retail and Totes' specifications, have also been submitted as exhibits A and B. Accordingly, the court assumes for purposes of the cross-motions that the sample and exhibits constitute uncontroverted evidence of what they show and serve to supplement the stipulated facts.

Based upon the record before the court on the cross-motions, including the exhibits, below are set forth the undisputed material facts:

1. The trunk organizer is a rectangularly shaped bag or case that measures approximately 19½ inches in length, 11½ inches in width, 8 inches in height, and has a three-sided zippered flap or closure covering the top of the bag and nylon web carrying handles. The case is composed of a woven nylon fabric with a coating impervious to penetration by oil or water.

2. The bottom of the trunk organizer has seams that are reinforced and sealed with polyvinyl chloride piping measuring approximately 5 millimeters in diameter. These seams completely encircle the bottom of the bag.

3. Sewn to the bottom surface of each trunk organizer and extending the width of the case are two one-inch wide velcro strips intended for gripping carpeted surfaces in the trunk interior, but permitting the trunk organizer to be easily detached and removed from the carpeting for carrying the case by its handles.

4. A trunk organizer's interior may be subdivided into as many as three discrete compartments by inserting into the bag the accompanying PVC covered cardboard dividers, which are held in position by metal snaps.

5. Totes' printed representations on its retail box (exhibit A) state that the trunk organizers have "Hefty web handles for easy carrying." These carrying handles or straps are attached to the front and back of the trunk organizer, and they measure approximately 20 inches from the points where they are joined to the case by stitching.

6. The printed representations on the retail box (exhibit A), also state that the trunk organizer "is designed to store trunk necessities (jumper cables, tire inflator, windshield washer fluid, etc.) in neat, orderly fashion."

7. In addition to its storage function, the trunk organizer is designed for carrying various automotive related tools and supplies, such as jumper cables, ice scraper, tire inflator and other tools, oil, windshield wiper fluid, antifreeze, cleaning and other fluids. The trunk organizer is capable of carrying any articles that will fit within the dimensions of the compartments of the bag.

8. The trunk organizers are sold by Totes to large retail stores like Sears, Roebuck & Company and J.C. Penny, and those stores display and market the bags to retail customers in their gift and accessories department or automotive department.

9. The trunk organizers are part of the Totes "Auto Club" product line and are marketed for use in motor vehicles for the purposes stated above.

DISCUSSION

As previously noted, this case is before the court on cross-motions for summary judgment. Fundamentally, summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment in its favor as a matter of law. CIT Rule 56(d). The court finds that there are no genuine factual issues for trial that are

material to the resolution of the claims raised in this action, and the issues of law raised may appropriately be resolved by summary judgment. *Lynteq, Inc. v. United States,* 976 F.2d 693, 695–96 (Fed. Cir. 1992); *Mingus Constructors, Inc. v. United States,* 812 F. 2d 1387 (Fed. Cir. 1987); *Texas Apparel Co. v. United States,* 12 CIT 1002, 698 F. Supp. 932 (1988), *aff'd per curiam,* 883 F.2d 66 (Fed. Cir. 1989), *cert. denied,* 493 U.S. 1024 (1990).

Defendant insists that the imports are of the same class or kind of containers as the exemplars named in Heading 4202, particularly tool bags, since they are the same kind of container and serve the same purpose as the named exemplars—organizing, storing, protecting and carrying various items—and accordingly, defendant urges the application of the rule of *ejusdem generis* to construction of the phrase "similar containers" in Heading 4202.[1]

In support of its argument, defendant cites *DRI Industries, Inc. v. United States,* 11 CIT 97, 657 F. Supp. 528 (1987) (Carman, J.), *aff'd,* 832 F. 2d 155 (Fed. Cir. 1987). *DRI* involved the tool chest portion of a "Tool Locker" comprised of the tool chest and a cabinet, and plaintiff's expert witnesses all opined that the primary purpose of the tool chest and cabinet was for storing and organizing tools. Some witnesses testified that the tool chest, which was designed to be carried or transported, had a limited or restricted portability. Holding that the tool chest were properly classified as luggage under the general provision for "like containers and cases" following the enumerated luggage exemplars listed in Schedule 7, Part 1, Subpart D, Headnote 2(a)(ii), TSUS, the *DRI* trial court observed that the tool chests were *ejusdem generis* with the exemplars. Thus, the court observed:

> The exemplars listed in 2(a)(ii) represent a category of containers or cases which are designed to store, organize and protect those contents from which the containers derive their name.

11 CIT at 102, 657 F. Supp. at 532.

Defendant has further called to the court's attention *E. C. McAfee & Co. v. United States,* 12 CIT 648 (1988) (Carman, J.), which invoked the rule of *ejusdem generis* in the classification as "like containers and cases" under the luggage provision in the TSUS an "odds and ends" compartmentalized tool case known as a Rolykit which was "light, portable and durable enough to be carried, * * * designed to store many items in an organized fashion [and] * * * designed with a built in handle for not merely storage but transportability." 12 CIT at 656. Focusing on the purpose of the articles, the court noted: "The Rolykit is clearly designed for the purpose of organizing, storing, protecting and packing various items." 12 CIT at 653. *McAfee* noted that while presumably an

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[1] Although the trunk organizers are claimed by defendant to have the same essential characteristics and purposes as possessed by all of the exemplar containers in Heading 4202 (and thus are claimed to be "similar containers" under the rule of *ejusdem generis*), defendant identifies the tool bags as the most similar exemplar inasmuch as the trunk organizers serve the purpose of organizing, storing and carrying, *inter alia,* automotive related tools. Plaintiff's claim that defendant's *ejusdem generis* argument is predicated solely on the trunk organizer's resemblance to the tool bag exemplar is without merit.

"odds and ends" case, the article could also be used as a tool case or hardware case. *Id.*, at 656. Finding that the merchandise possessed characteristics in common with the luggage articles enumerated in Headnote 2(a)(ii), Subpart D, Part 1, Schedule 7, TSUS, the court held that the merchandise was properly classified as luggage under item 706.62, TSUS. *Id.*

In opposing the inclusion of the trunk organizers within the "similar containers" provision of Heading 4202 by application of *ejusdem generis*, and attempting to distinguish *DRI* and *McAfee* from the facts of the current case, Totes relies heavily on the rationale of *Sports Graphics, Inc. v. United States*, ____ F.2d ____, Appeal No. 93–1140 (May 12, 1994). With reference to the rule of *ejusdem generis* as applied to the TSUS luggage provision, the Federal Circuit observed:

> Under the rule of *ejusdem generis*, which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified. [citation omitted.] As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* in order to be classified under the general terms. [citation omitted.]

Slip Op. at 4.

In determining whether "Chill" coolers used for the cold storage and preservation of food and beverages over a period of time fell within the TSUS provision for luggage, the appellate court in *Sports Graphics* viewed the *purpose* of the imported coolers for storage of food and beverages as the critical consideration, and found that merchandise with such food preservation use "has a different purpose, * * * [than that served by the luggage exemplars] which precludes the merchandise from being *ejusdem generis* with the [luggage] exemplars listed in * * * the luggage provision." Slip Op. at 6.

Pointing up the principal function of the trunk organizers, *viz.*, to organize and store automotive tools and supplies in the trunk of a motor vehicle rather than transport them from place to place, Totes claims an analogy of the trunk organizer's automotive supplies storage function to the Chill coolers' function of food preservation and the applicability of the *Sports Graphics* rationale rejecting *ejusdem generis* with the luggage exemplars under the TSUS provision. Therefore, Totes argues that trunk storage for supplies and protection of the trunk from oil and water are purposes completely extraneous to the common features and purposes of the Heading 4202 exemplars, negating *ejusdem generis* with such exemplars.

Moreover, insists Totes, *DRI* and *McAffee* are inapposite here since, unlike the trunk organizers, the tool chests and Rolykits possessed no utility or functions other than those served by luggage—to organize, store, protect and carry various items—and unlike the trunk organizers, the tool chests and Rolykits in *DRI* and *McAffee* possessed no utility or use specifically described by the TSUS provisions claimed applicable

by the importers. As previously noted, Totes claims that the trunk organizers are specifically described by the tariff provision for automobile parts and accessories.

Following the rationale of the above-cited cases involving the TSUS luggage provisions and the application of *ejusdem generis,* the specific issue of law to be addressed in the current case is whether, on the basis of the undisputed material facts before the court, the trunk organizers possess the essential characteristics of or serve a common purpose like that served by the exemplars in Heading 4202, and hence by the operation of *ejusdem generis* fall within the purview of "similar containers."

The court holds that the essential characteristics and purpose of the Heading 4202 exemplars are the very ones that the courts identified with reference to the TSUS luggage provisions in *DRI* and *McAffee, viz.,* to organize, store, protect and carry various items. Clearly, the trunk organizers possess those essential characteristics and purpose; their low profile, velcro strips, and oil and water resistant fabric incidental to their design for use in the trunk of a motor vehicle, do not alter the *essential* characteristics and purpose of the imports so as to negate *ejusdem generis* with the Heading 4202 exemplars.

As to the broad reach of the residual provision for "similar containers" in Heading 4202 by virtue of *ejusdem generis,* this writer finds it significant that the individual exemplars are disparate in their physical characteristics, purposes and uses ranging from such small containers as spectacle and cigarette cases, wallets, and tobacco pouches to such large containers as trunks and suitcases. Accordingly, Totes' strenuous effort to distinguish the size and specific purposes of the trunk organizers from tool bags is no more effective in negating *ejusdem generis* under Heading 4202 than pointing out such distinctions between tool bags on the one hand and jewelry boxes or spectacle cases on the other.

As is evident from the obvious physical and use disparities of the tool chests in *DRI* and the Rolykits in *McAffee* from the golf bags, camera cases and other TSUS luggage exemplars, the rule of *ejusdem generis* requires only that the merchandise possess the essential character or purpose *running through all of the enumerated exemplars. See e.g., Izod Outerwear v. United States,* 9 CIT 309 (1985) ("[a]pplying *ejusdem generis* to item 376.56, TSUS, the Court must determine what characteristics are shared by garments designed for 'rainwear,' 'hunting,' and 'fishing', and whether the jackets have these characteristics"; however, to be classifiable under item 376.56 for garments designed for "similar uses," garments need not (like rainwear) be made of fabric sufficiently waterproof to pass the "cup test").

Insofar as the trunk organizers serve the purposes of organization, holding, storage and protection of articles, they fall within the class or kind of articles listed as exemplars in Heading 4202, especially jewelry boxes and cutlery cases that serve mainly to facilitate an organized separation, protection, storage or holding of jewelry or cutlery items that might otherwise simply be placed in a dresser drawer or kitchen cabinet

respectively in an unorganized manner. Like the tools and supplies temporarily removed from the trunk organizers for use in automotive maintenance, jewelry and cutlery may be removed from their boxes or cases for use and then returned for storage and protection in an organized fashion, without moving the containers from their location.

To the extent that some of the exemplars in Heading 4202 are designed for carrying their contents from place to place, it is significant that, as the parties have stipulated, "[t]he Totes Trunk Organizer *is designed for carrying* the type of articles described in paragraph 11 of these undisputed facts *[viz.,* tools, oil, antifreeze, windshield washer fluids]" (emphasis added) . The carpet-gripping velcro strips serve to prevent the organizers from shifting position while placed in the trunk of a vehicle, but when desired by the user, permit easy detachment and removal of the bags from the trunk for carrying; the velcro strips do not impair the trunk organizer's featured design for carrying the contents, and in fact complement and facilitate the carrying feature of the trunk organizer.

Plaintiff's effort to denigrate the carrying capacity and function of the imports is expressly contradicted by its stipulation, *supra.* indeed, plaintiff's attempt to minimize the carrying capacity of the imports is further undermined by the parties' stipulation that "the box in which it [trunk organizer] is sold states that the organizer has hefty web handles for *easy carrying"* (stipulated facts, par. 11, emphasis added). Additionally, Totes' Product Performance Specifications pertinent to the trunk organizers' handles refute Totes' attempt to divert attention away from the design and capacity of the imports for carrying their contents. Those specifications read (emphasis added):

> J. Handles:
>
> 1. Handles *must* be present, properly located and of the correct length as specified on the engineering drawing.
> 2. *Must* withstand a disassembly pull force of 50 lbs (emphasis added).

Counsel for plaintiff insists that the straps or handles of the trunk organizers are designed simply to permit the user to shift the position of the bag within the confines of the cargo compartment, or to lift the organizer out of the trunk to gain access to its contents or to the trunk area itself. Importantly, however, there is no stipulation of fact or any other evidentiary matter submitted on these cross-motions supporting such *factual assertion* of Totes' counsel. Fundamentally, of course, argument of counsel is not evidence before the court in support of a motion, and obviously, arguments based on asserted facts at variance with those stipulated by the parties will not be considered by the court.

In any event, whether portability of the import is a primary or ancillary feature, is not legally controlling in its classification as "similar con-

tainers" under Heading 4202.[2] Thus, even assuming that the trunk organizer's portability or design for carrying is ancillary to its storage purpose, the trunk organizers are nonetheless *ejusdem generis* with the exemplar containers in Heading 4202—precisely the purpose of jewelry boxes that are used primarily to organize, store and protect articles, and only incidentally (if at all) to transport the contents. As noted in *DRI*, regarding the tool chest in issue:

> The tool chest may not be used by a tradesman to carry from place to place in his profession, but it is clearly contemplated the chest will be used by the average home handyman in a transportable manner as his needs require. *Although the primary design may not be tailored to this portable function, the portability is not the only factor in the classification of the tool chest. The question is not only one of portability but whether or not the item at issue does have characteristics in common with the enumerated articles. This Court holds that it does.*

11 CIT at 103 (emphasis added)

Following the rationale of *DRI and McAffee* under the TSUS luggage provision, this court, too, expressly rejects as a requirement for classification by *ejusdem generis* as "similar containers" under Heading 4202 that the principal design feature of the merchandise be portability or transportation of the contents. As stressed in *McAffee*, "[t]he important question at issue is whether or not the [merchandise] has *characteristics in common* with the enumerated articles" (emphasis in original). 12 CIT at 655, citing *DRI Industries*, 657 F. Supp. at 533.

Totes' additional contention that the trunk organizers are not "similar containers" within the purview of Heading 4202 because they are not tool bags *per se* (which defendant concedes) is of no avail in defeating classification pursuant to Heading 4202. "The question is [not whether the import is a tool bag or similar only to a tool bag, but] * * * whether or not the item at issue does have characteristics in common with [all] the enumerated articles [in Heading 4202]." *DRI Industries*, 657 F. Supp. at 533. *See also Adolco Trading Co. v. United States*, 71 Cust. Ct. 145, 154, C.D. 4487 (1973). Precise functional equivalence to, or commercial interchangeability with, any one particular exemplar enumerated in the Heading plainly is not required by the rule of *ejusdem generis*. More, Totes' argument that the trunk organizers are excluded from Heading 4202 because they are not specially shaped or internally fitted to accommodate particular tools *(see* 2 *Explanatory Notes* at 613) is rejected.

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[2] Under TSUS Headnote 2(a)(ii) of Schedule 7, Part 1, Subpart D, the term "luggage" included containers and cases "designed to be carried with the person." While the trunk organizers are stipulated to be designed to be carried, no such express design for carrying requirement exists in Heading 4202. Moreover, the court may take judicial notice that common types of luggage—men's suit bags or ladies' dress bags—are used both to carry or transport garments in a neat and organized manner and/or to store and protect the garments while in the trunk of a car or while the bags are hung in a closet. The fact that most of the time such garment bags may be utilized for storing garments in the trunk of a motor vehicle or closet does not make such bags any less "similar containers" in Heading 4202.

Many fitted or compartmentalized cases, bags or other containers among the exemplars in Heading 4202 are routinely used to carry with the person a specific article or related articles, *viz.*, cameras, lenses film, etc.; golf clubs, balls, shoes, tees, etc; and tennis rackets and balls, and are also used to store and protect these articles after they are reinstalled into their containers.

The short of the matter is: whether the carrying feature or organized storage feature of the container is the primary or secondary use is simply not a material issue in their classification under Heading 4202.

Plaintiff's contention that the trunk organizers are not classifiable under Heading 4202 because they are not sold in the luggage departments of stores (there is no stipulation to such fact) is irrelevant. The court may take judicial notice that such exemplar items as spectacle cases, binocular cases, gun cases, camera cases, shopping bags, tool bags, jewelry boxes, etc. would very unlikely be found in typical luggage departments.

Furthermore, plaintiff's argument that the placement of the carrying handles on the opposite sides of the trunk organizers is atypical of the exemplar containers in Heading 4202 is likewise meritless. The court may take judicial notice that such articles as trunks, travelling bags, backpacks, handbags, shopping bags, tool bags, and sports bags commonly provide handles on the opposite sides of the articles.

Plaintiff's contention that the trunk organizers are excluded from Heading 4202 because they are not designed for carrying clothing and other personal effects during travel, citing the HTSUS Chapter 42, Additional U.S. Note 1 reference to "travel, sports and similar bags" is irrelevant. Defendant makes no claim that the trunk organizers are classifiable as "travel, sports and similar bags."

Plaintiff asserts that "it is unnecessary for this Court to consider defendant's arguments concerning whether the Trunk Organizer is *ejusdem generis* with the exemplars of heading 4202" since subheading 8708.99.50 is a "use" provision, which is always more specific than an *eo nomine* provision like tool bags.

First, the court agrees with defendant that the express exclusion from parts and accessories of motor vehicles of articles covered more specifically by another heading elsewhere in the Nomenclature, *e.g.*, tool bags, *see* General Headnote 111(c), Section XVII_of the Explanatory Notes to HTS, demonstrates intent to also exclude from parts and accessories of motor vehicles containers *similar* to tool bags. Such intent is buttressed by prefacing the excluded list of articles (which includes tool bags), with *e.g.*, which means that tool bags are listed as only *an example* of the type of container that might be used in connection with a motor vehicle that must be regarded as more specifically provided for under Heading 4202. *A fortiori*, containers similar to tool bags are intended to be excluded from parts and accessories covered more specifically in the Nomenclature.

Second, since the General Headnote makes the *eo nomine* provision for "tool bags" a more specific tariff provision for such bags than the "use" provision for motor vehicle parts and accessories, Totes' argument that following *United States v. Simon Saw & Steel Co.*, 51 CCPA 33, C.A.D. 834 (1964) a use provision must necessarily prevail over the provision for similar containers under Heading 4202 is rejected. Accordingly, the court holds that predicated on *ejusdem generis*, the imported bags are more specifically classifiable under the provisions for the bags, cases and similar containers in Heading 4202 even if they are principally

used as motor vehicle parts or accessories within the purview of Heading 8708.

Finally, the trunk organizers are not classifiable under the basket provision for textile articles in Subheading 6307.90.9986 because they are specifically provided for under Heading 4202, and as such, excluded from classification under Heading 6307 by the Explanatory Notes to that Heading.

CONCLUSION

Even if describable as a passenger automobile accessory within the purview of HTSUS subheading 8708.99, as claimed by Totes, the trunk organizer is more specifically provided for as "similar containers" by operation of *ejusdem generis* under Heading 4202, and consequently, pursuant to General Note 111(c) to section XVII of the *Explanatory Notes* to HTS, they are excluded from the provision primarily claimed by Totes. *See* 4 *Explanatory Notes* at 1412 ("[p]arts and accessories, even if identifiable as articles of this Section, are **excluded** if they are covered more specifically by another heading elsewhere" in the tariff). Moreover, the imports are more specifically described under Heading 4202 than under the alternative provision claimed by plaintiff for "other made up textile articles" in subheading 6307.90.99. *See* 2 *Explanatory Notes* 867–68.

Accordingly, plaintiff's motion for summary judgment is denied, and defendant's cross-motion for summary judgment sustaining Customs' classification of the imported merchandise under subheading 4202.92.9020, HTUS, and dismissing the action is granted.

Judgment will be entered for defendant dismissing the action.

Index

Customs Bulletin and Decisions
Vol. 28, No. 42, October 19, 1994

U.S. Customs Service

Treasury Decisions

General Notices

Proposed Rulemaking

U.S. Court of International Trade

Slip Opinions

U.S. G.P.O. 1994–301–610–00006